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No. _____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

TERRY STEWART, ET AL.,
PETITIONERS,

-VS-

JOE CLARENCE SMITH., JR.,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JANET NAPOLITANO
ATTORNEY GENERAL

PAUL J. McMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS SECTION

JACK ROBERTS
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686
ATTORNEYS FOR PETITIONERS

84pp

QUESTIONS PRESENTED FOR REVIEW

1. May a circuit court rely on hearsay materials—including a report never presented to the state courts—not submitted in compliance with Fed. R. Civ. P. 56(e) to reverse a district court's grant of summary judgment in favor of the State in a habeas action?

2. Did the Ninth Circuit misconstrue *Strickland* to allow a circuit court to find "actual prejudice" on the basis of mere speculation about the effects of an expert's post-sentencing report that was never submitted to the state courts or considered by the district court?

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OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 189 F.3d 1004 (9th Cir. 1999). The State has included it as Appendix A. The unpublished order of the district court denying Smith's petition for writ of habeas corpus is included as Appendix B.

STATEMENT OF JURISDICTION

The State respectfully requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, issued on August 31, 1999. The State timely filed a petition for rehearing, and a suggestion for rehearing en banc, which the Ninth Circuit denied on February 10, 2000. The State timely filed this petition for writ of certiorari within 90 days of denial of the petition for rehearing, and the extension to June 9 granted by Justice Sandra Day O'Connor by her order of May 1, 2000. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.1.

PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Rule 56, Federal Rules of Civil Procedure, provides in pertinent part:

> (e) When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

On February 7, 1974, Joe Clarence Smith was placed on probation following his convictions for two counts of rape in Maricopa County Superior Court Cause Nos. CR–77216 and 77394. While still on probation in February 1975, Smith raped and sodomized a pregnant woman to whom he had offered a ride, which led to the charges in CR–92168. In July 1975, Smith and a companion kidnapped, raped, and brutally stabbed a 15-year-old girl who was hitchhiking. *State v. Smith*, 599 P.2d 199, 202 (Ariz. 1979).[1] These crimes preceded the vicious murders, described hereafter, that put him on death row.

In late December 1975, Smith took 18-year-old Sandy Spencer into the desert near Phoenix, Arizona. He stripped her and, while she was still alive, stabbed her 20 times in the groin and pelvic area, including inside the vagina. In addition, he stabbed her in both breasts and left a 2½-inch sewing needle imbedded in her left breast and chest wall. Finally, Smith killed her by forcing dirt into her mouth and nose, then taping her mouth shut.

Less than a month later, Smith picked up 14-year-old Neva Lee and took her to the desert. There he bound her hands and feet. He stabbed her at the left side of her vulva and vagina and inflicted numerous other wounds, some prior to her death, some contemporaneous, and some post-mortem. As he did with Ms. Spencer, Smith forced dirt into Ms. Lee's mouth, larynx, and trachea, down into her windpipe and lungs, then taped her mouth shut, thus asphyxiating her.

On February 29, 1976, police and sheriff's agents set up surveillance of Smith. Officer Donna Crowe wore a concealed

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1. Although the Arizona Supreme Court reversed this conviction because the trial court precluded a defense witness from testifying due to untimely disclosure, the opinion notes that Smith admitted having intercourse with the girl, but claimed that it was voluntary and that his companion stabbed the victim for some unknown reason. *Smith*, 599 P.2d at 202.

transmitting device and posed as a hitchhiker. At 9:30 p.m., Smith picked up Officer Crowe and dropped her off in the area of 43rd Avenue and Thomas in Phoenix. Two hours later, he picked her up again, but this time he drove her to the Astro Machine Shop, which his father owned.

After some conversation in the shop, Smith grabbed Officer Crowe by the arms and refused to let her go, even after she said "No, hands off, hands off." The officer then spoke the prearranged code words—"What's going on?"—that signaled other officers to come to her aid. Smith released his grip on Officer Crowe only after the other officers entered the shop. Smith was arrested and charged with false imprisonment and simple assault.

In August 1976, Smith was convicted of rape in CR–92618, an offense he committed in February 1975. That third conviction for rape led to revocation of probation in CR–77216 and CR–77394. For the three offenses, the trial court imposed terms of imprisonment of 5 years to life in CR–77216, 10 years to life in CR–77394, and 75 years to life in CR–92618, all sentences to run consecutively. The Arizona Supreme Court affirmed the conviction in CR–92618, and the revocations of probation in CR–77216 and CR–77394. *State v. Smith*, 569 P.2d 817 (Ariz. 1977).

On September 10, 1976, while serving his sentences for the offenses described above, Smith sent word to the authorities that he wished to speak with the police about the "desert slayer." After receiving permission from Peter DeAmborgio, the attorney who was representing Smith on appeal from the convictions for which he had been imprisoned, the police interviewed Smith on the morning of September 25, 1976.

The officers advised Smith of his *Miranda*[2] rights and told him that they were aware that he had given an interview to the newspaper concerning the murders of Ms. Spencer and Ms. Lee. Smith told the

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2. *Miranda v. Arizona*, 384 U.S. 436 (1966).

police that on a date he could not recall, he got into his car after stopping briefly at a store. Supposedly, a man named John Jameson (whose ex-wife had been dating Smith) had hidden in the back and placed a gun against the back of Smith's neck. Under Jameson's direction, they drove to a shopping center and picked up a young girl (Neva Lee). According to Smith, Jameson then directed him to drive to a desert area, where Jameson bound Smith's hands and Ms. Lee engaged in sexual intercourse with Smith on the front seat of the car. Jameson also bound Ms. Lee's hands in front of her and taped her mouth shut. While she was sitting on Smith having intercourse with him, Jameson allegedly stabbed her in the chest and dragged her out of the car. Jameson made Smith collect all of her clothing and drive back to the store where Jameson had kidnapped him; Jameson got out and Smith drove home. Smith told the police that Jameson said that he had orchestrated the previous scenario "in order to get a rape charge" on Smith so that Smith would stop seeing Diane, Jameson's ex-wife.

On November 4, 1976, the authorities charged Smith with the first-degree murders of Sandy Spencer and Neva Lee. The trials were severed. Testimony in the trial for the murder of Neva Lee began on June 7, 1977. The jury found Smith guilty of first-degree murder on June 17, 1977.

Presentation of evidence in the trial for the murder of Sandy Spencer began on July 6, 1977. The next day, after an in-camera hearing involving allegations of harassment of a State's witness (Diane Jameson), Smith indicated a desire to plead guilty. The trial court conducted a lengthy examination in camera. Smith described how he picked up Sandy Spencer hitchhiking, took her to a desert area, bound her, forced dirt into her mouth, and put tape over her mouth to keep the dirt in. In response to questions from the prosecutor, he admitted stabbing the victim and putting needles in her breasts to make sure that she was dead. Smith identified the victim's coat and stated that he had given it to Diane Jameson.[3]

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3. The State intended to present evidence that Smith had given Ms. Spencer's coat (continued...)

At the conclusion of the in-camera hearing, the trial court found that Smith's plea was knowing, intelligent, and voluntary, found a factual basis for it, and accepted it. The trial court then summoned the jurors and discharged them.

Within 3 weeks, defense counsel filed a motion to withdraw the plea on the basis that Smith pled guilty only out of concern for his parents and Ms. Jameson. The trial court questioned whether Smith was playing games. The trial court ultimately denied the motion to withdraw the plea, observing that it would be a "fraud on the Court" to permit Smith to withdraw the plea.

On August 31, 1977, after an aggravation-mitigation hearing, the trial court found the following aggravating circumstances for each of the two murders: (1) conviction of another offense for which under Arizona law a sentence of life imprisonment or death was imposable (three prior rape convictions and the murder convictions); (2) conviction of a felony involving the use or threat of violence on another person (three prior rape convictions and the murder convictions); and (3) commission of the murders in an especially heinous, cruel or depraved manner. The trial court found no statutory mitigating circumstances and sentenced Smith to death for each murder.

Smith appealed the convictions and sentences to the Arizona Supreme Court. On July 13, 1979, the Arizona Supreme Court affirmed the convictions, but remanded the case for resentencing to permit Smith to present mitigation without restriction. *State v. Smith,* 599 P.2d 187 (Ariz. 1979).

On November 7, 1979, after a second presentence hearing, the trial court found the same aggravating circumstances it had found at the first

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(...continued)
to Diane Jameson, but told her not to wear it. When he saw Ms. Jameson wearing the coat a few weeks later, he told her that someone had been stabbed and murdered in the coat. After the police arrested Smith, he instructed Ms. Jameson to bury the coat in the desert. She did so, but later led the police to it.

sentencing (except that it limited the "prior felony convictions involving the use or threat of violence" to the three prior rape convictions). The trial court found no mitigation and again imposed death sentences for the two murders.

On December 7, 1981, the Arizona Supreme Court affirmed the death sentences. *State v. Smith*, 638 P.2d 696 (Ariz. 1981).

On August 18, 1983, Smith filed his first petition for post-conviction relief in the trial court. On February 17, 1984, the trial court summarily denied relief. The Arizona Supreme Court denied review on May 4, 1984.

Smith then filed a petition for federal habeas corpus relief in the federal district court. On December 17, 1984, the district court dismissed the petition pursuant to *Rose v. Lundy*, 405 U.S. 509, 510 (1982), because Smith conceded that some claims were unexhausted.

On January 21, 1985, Smith filed his second petition for post-conviction relief. Defense counsel moved to amend the second petition to allege that trial counsel were ineffective for failing to act upon the court-appointed investigator's opinion that Smith seemed to have multiple personalities. Counsel requested 30 days to consult with Smith about the claim in order to confirm whether the petition should be amended to include that claim.

On July 9, 1985, the trial court summarily denied relief on all the issues in the second petition, except the claim regarding the malice instruction; it set an evidentiary hearing on that issue. The trial court denied Smith's request to amend the petition to include the claim asserting multiple personalities, without prejudice. After the evidentiary hearing on the malice instruction, the trial court concluded that the trial transcript inaccurately set forth the malice instruction that had been given, and therefore denied relief on the claims related to the instruction.

Smith filed a timely petition for review, which the Arizona Supreme Court denied on March 5, 1986.

A year later, Smith filed a second habeas corpus petition in the federal district court, raising numerous claims that had never been presented to the state court. On December 15, 1987, the district court dismissed the matter pursuant to *Rose v. Lundy, supra*.

On March 11, 1988, Smith filed his third state petition for post-conviction relief, raising thirty-five issues. The trial court held all claims precluded and dismissed the third petition on January 5, 1990.

Smith filed a petition for review, which the Arizona Supreme Court denied on January 16, 1991.

On October 3, 1991, Smith initiated his third habeas proceeding in the federal district court. After extended litigation regarding the district court's order granting Smith's motion to disqualify the Arizona Attorney General's Office as counsel for the State, new counsel for the State filed a motion for summary judgment. Smith filed a response and counsel for the State filed a reply.

On May 14, 1996, the district court issued an order. It considered the issues raised in the amended petition and found that only seven of them were properly exhausted and subject to an on-the-merits review.

On January 21, 1997, the district court affirmed its procedural default ruling. App. B at 5–9. The court then denied relief on the remaining claims on the merits. *Id.* at 10–26. Accordingly, the court granted the *State's* motion for summary judgment and denied the habeas petition. *Id.* at 25–26.

On appeal, Ninth Circuit Judges Reinhardt and Ferguson held that Smith's counsel was ineffective at resentencing in 1979, and that they could not "have confidence" in the outcome of that sentencing. App. A at 8, 21. Ignoring Ninth Circuit precedent in two other capital cases from Arizona, they did not remand this case to the district court for an

evidentiary hearing to see if Smith could establish the actual prejudice required by *Strickland v. Washington*, 466 U.S. 668 (1984). Instead, they *assumed* actual prejudice, granted Smith de facto summary judgment, and ordered a new sentencing.

Judge Fernandez dissented. He concluded that, in view of the three aggravating circumstances proved by the State at both sentencings, and the particularly cruel and heinous nature of the rape-murders of Sandy Spencer and Neva Lee, an objective reviewer could not conclude that there was a reasonable probability that the trial court would have imposed a different sentence if counsel had presented testimony about alleged multiple personalities. App. A at 22–27.

REASONS WHY THE WRIT SHOULD ISSUE

The district court granted the *State's* motion for summary judgment in this case under Rule 56(b), Federal Rules of Civil Procedure. The Ninth Circuit lost sight of the fact that it was reviewing the granting of a motion for summary judgment *in the State's favor.* Contrary to precedent from this Court and other circuits, the majority relied on hearsay that was *not* legitimate "evidence" sufficient to defeat a summary judgment motion under Rule 56, and assumed, as fact, bare allegations unsupported by affidavits. The majority relied heavily on the 1987 report of a Dr. Tatro—a report *deliberately withheld from the state courts by post-conviction counsel,* not submitted to the district court in support of the merits of the ineffectiveness claim, not considered by the district court in its rejection of the ineffectiveness claim, and not relied on by defense counsel in briefs to the Ninth Circuit.

Furthermore, by ordering a resentencing on the basis of unsworn and untested allegations, the Ninth Circuit *granted Smith de facto summary judgment* without allowing the State the opportunity to test the hearsay allegations at a hearing, or to present evidence in rebuttal. Under this Court's reasoning in *Weisgram v. Marley Co.*, ___U.S.___, 120 S. Ct. 1011 (2000), the Ninth Circuit's grant of judgment as a matter of law to the verdict loser in the district court—without giving

the State the opportunity to test the hearsay allegations—was fundamentally unfair. The Ninth Circuit's decision in this case also conflicts with its opinions in *Wallace v. Stewart*, 184 F.3d 1112 (9th Cir. 1999), and *Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998). In those capital cases from Arizona, the district court also granted the State's motion for summary judgment. On appeal, the Ninth Circuit held that the defendant had shown that his trial counsel was ineffective, but that court remanded the cases to the district court for an evidentiary hearing to permit the State to test the proposed evidence, and to allow the district court to determine whether those defendants could prove actual prejudice under *Strickland*.

The majority committed error in its *Strickland* analysis by assuming: (1) that Smith could have established, as fact, bare assertions; (2) that the trial court would have found all defense witnesses credible and persuasive; (3) that the State could not have cross-examined the defense witnesses effectively, or rebutted them with other experts; and (4) that, if the trial court had found the defense witnesses credible, and the evidence to be mitigating, it would have given the evidence such great weight that there is a "reasonable probability" that it would have outweighed *three* powerful aggravating circumstances. In other words, *the majority has assumed what Strickland requires Smith to prove.*

By contrast, Judge Fernandez applied the proper test under *Strickland*, and concluded that nothing Smith presented 20 years after resentencing would probably have changed the sentence of death in view of the three powerful aggravating circumstances the State proved.

Even if this Court agrees that the Ninth Circuit properly reversed the district court's grant of summary judgment in favor of the State, the proper remedy in this case is not to grant a resentencing. The proper remedy is to remand this case for an evidentiary hearing in the district court to permit Smith's claims to be *tested* under the proper standard, instead of *assuming* their validity and persuasiveness. If Smith cannot demonstrate a reasonable probability of a different result, then he is not entitled to be resentenced.

ARGUMENTS

I

CONTRARY TO THE PLAIN LANGUAGE OF RULE 56, THIS COURT'S PRECEDENT, AND PRECEDENT FROM OTHER CIRCUITS, THE NINTH CIRCUIT IMPROPERLY RELIED ON HEARSAY TO REVERSE A GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE STATE.

A. General Legal Principles.

One of the principle purposes of the summary judgment procedure is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This Court has held that summary judgment must be granted against a party who fails to demonstrate facts to establish an element essential to its case where that party will bear the burden of proof of that element at trial. *Id.* at 322.

Rule 56, Federal Rules of Civil Procedure, which governs motions for summary judgment, provides in pertinent part:

> (e) When a motion for summary judgment is made and supported as provided in this rule, *an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.* If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(Emphasis supplied.)

The party seeking summary judgment must initially identify for the district court the basis for its motion, and those portions of the adverse party's pleadings, depositions, and affidavits, if any, that the moving

party believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party has done this, Rule 56(e) requires the adverse party to "go beyond the pleadings," and show, by *that party's own affidavits, depositions, or other evidence prescribed in the rule,* specific facts showing that there is a genuine issue for trial. *Id.* at 324. "[T]he purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least *one sworn averment of that fact* before the lengthy process of litigation continues." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888–89 (1990) (emphasis supplied).

B. APPLICABLE FACTS.

Five psychiatrists and one psychologist examined Smith in 1976 and 1977. None of them diagnosed a major mental illness or impairment, and none of them observed any symptoms of multiple personalities. Dr. Jacob Hoogerbeets, a psychiatrist, and Dr. Faye Goldberg, a psychologist, testified for the defense at the mitigation hearing prior to sentencing. Dr. Hoogerbeets concluded that Smith was emotionally disturbed, a borderline psychotic driven to compulsory aberrant actions, but able to distinguish right from wrong. *Smith*, 638 P.2d at 699–700. Dr. Goldberg opined that he "fitted the profile of a sadistic sexual slayer," but that he knew his actions were wrong. *Id.* at 700. By contrast, Dr. Michael Cleary, a psychiatrist testifying for the State, concluded that Smith did not suffer from a mental disorder, nor was he driven by an irresistible compulsion. *Id.* at 700–01.

While Smith's second state petition for post-conviction relief was pending in 1985, defense counsel deposed Richard Todd, an investigator who assisted defense counsel prior to trial. Todd testified that, in interviews with Smith before trial, he saw indications of what he believed to be multiple personalities. Although counsel asked for additional time to consult with Smith to see whether counsel should amend the second petition to include a claim of multiple personalties, the trial court denied the motion to amend *without prejudice*, and counsel did not thereafter seek leave to file an amended petition.

After the trial court denied relief, counsel argued in the motion for rehearing that the trial court erred by denying his motion to amend (without prejudice), and that the trial court should have conducted an evidentiary hearing on the "propriety of counsel's decision to not present the insanity defense at trial." Post-conviction counsel never alleged that trial counsel was ineffective for failing to present evidence of alleged multiple personalities *at sentencing*.

In 1987, at the request of David Lee Titterington, an assistant federal public defender, Dr. Donald Tatro examined Smith and submitted a 30-page report to Mr. Titterington dated August 4, 1987. It was this report the Ninth Circuit would use in 1999 to reverse and order a new sentencing on the basis of alleged multiple personalities. On March 11, 1988, Mr. Titterington filed the third State petition for post-conviction relief. For the first time, the defense alleged that Larry Maddox, a friend of Smith, had seen indications of multiple personalties in Smith's behavior, and that Debbie Lippiett, Smith's former girlfriend, had indicated that Smith sometimes displayed "wide mood swings." Counsel did not supply affidavits or depositions from Maddox or Lippiett. Mr. Titterington argued that trial counsel was ineffective for not having presented Todd, Maddox, and Lippiett as mitigation witnesses at the resentencing in 1979. But he did not submit Dr. Tatro's report in support of the petition for post-conviction relief even though he received it over 7 months prior to filing the third petition. Moreover, when Mr. James Hart—a state-appointed attorney —submitted a supplemental memorandum in support of the petition in October 1989, he did not include the report. In 1990, the trial court found all issues precluded and dismissed the third petition *without ever having seen Dr. Tatro's report.*

When Mr. Titterington filed an amended petition for writ of federal habeas corpus in the district court on April 27, 1992, he asserted that trial counsel was ineffective at resentencing for not having presented Richard Todd and Larry Maddox to testify about alleged multiple personalities, and Debbie Lippiett to testify about "wide mood swings." He did *not*, however, allege that counsel was ineffective for not having presented Dr. Tatro at the resentencing. Mr. Titterington did not submit

Dr. Tatro's report in support of the petition or the memorandum accompanying the petition.

The State filed a motion for summary judgment and contended that the claim of ineffectiveness at resentencing—among many others—had been procedurally defaulted. Defense counsel filed a response to that motion on October 25, 1993—but he did *not* include Dr. Tatro's report. In an effort to circumvent procedural bar, defense counsel submitted a memorandum on cause and prejudice on July 15, 1996. He attached a copy of Dr. Tatro's 1987 report—*not* in support of the argument about ineffective assistance in the amended petition—but in an attempt to demonstrate that a fundamental miscarriage of justice would occur if the district court did not reach numerous defaulted claims because Smith was "actually innocent" of the death penalty.

Rejecting the claim of ineffective assistance on the merits, the district court noted that none of the experts who examined Smith prior to trial identified any clinical symptoms of multiple personalities, or any major psychosis. App. B at 21. For that reason, the trial court would still have imposed the death penalty if trial counsel had presented the lay testimony of Todd, Maddox, and Lippiett. *Id* The district court did not refer to Dr. Tatro's report because Smith did not attach it to his amended petition, the accompanying memorandum, or his opposition to the State's motion for summary judgment.[4]

In the briefs on the merits to the Ninth Circuit, defense counsel never alluded to Dr. Tatro's report, arguing instead that the district court erred by concluding that presentation of the lay testimony of Todd, Maddox, and Lippiett would probably not have resulted in a different sentence.

The Ninth Circuit reversed the district court and held, primarily on the basis of Dr. Tatro's report, that Smith's counsel was ineffective at

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4. The district court alluded to Dr. Tatro's report only in rejecting the contention that the report established that a fundamental miscarriage of justice would occur if the district court did not reach procedurally defaulted issues. App. B at 8–9.

resentencing, and that Smith was entitled to a new sentencing. App. A at 22.

C. DISCUSSION.

The glaring error committed by the Ninth Circuit is that, with the exception of Richard Todd's deposition, none of the material relied on by the majority was *legitimate evidence, pursuant to Rule 56(e), Federal Rules of Civil Procedure, sufficient to defeat the State's motion for summary judgment.* The majority never mentions that neither in the state courts, nor in the district court, did Smith present affidavits or depositions from Maddox, Lippiett, or Dr. Tatro. The majority also fails to mention that defense counsel never presented Dr. Tatro's report to the state courts even though he had it 7 months before he filed the third petition for post-conviction relief,[5] that Smith did not offer the report in support of his amended petition in the district court, or in his memorandum opposing the State's motion for summary judgment.

The Ninth Circuit's reliance on hearsay to reverse the district court's grant of summary judgment in favor of the State was contrary to this Court's holding in *Lujan*, which states that "[T]he purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case *to demand at least one sworn averment of that fact* before the lengthy process of litigation continues." 497 U.S. at 888–89 (emphasis added). To this day, Smith has never offered any state or federal court a "sworn averment of fact" —in the form of affidavits or depositions—from Maddox, Lippiett, or Dr. Tatro.

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5. Consideration of Dr. Tatro's report also violated this Court's holding in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). Although Tamayo-Reyes failed to develop the factual basis of his claim in state court, at least he raised the claim there and in district court in his federal habeas proceeding. By contrast, Smith's counsel had Dr. Tatro's report before he filed the third state petition for post-conviction relief, but did not present it in that proceeding, or to the district court in support of the substantive argument on ineffective assistance.

Moreover, the Ninth Circuit has held previously that, to defeat a motion for summary judgment, the adverse party may not simply rely on the allegations in its pleadings, *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 630 (9th Cir. 1987), and that legal memoranda are *not evidence* and do not create issues of fact capable of defeating a valid motion for summary judgment. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978). Thus, the result in this case conflicts with the Ninth Circuit's own previous rulings on sufficiency of the evidence to defeat a motion for summary judgment.

In addition, the Ninth Circuit's reversal in this case also conflicts with decisions of other circuits, which recognize that bald assertions and conclusory allegations—even in affidavits of expert witnesses—are not competent evidence to defeat a motion for summary judgment. *Jackson v. Anchor Packing Co.*, 994 F.2d 1295, 1304 (8th Cir. 1993) ("Conclusory affidavits, even from expert witnesses, do not provide a basis upon which to deny motions for summary judgment."); *Hadley v. County of DuPage*, 715 F.2d 1238, 1243 (7th Cir. 1983) ("Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter, rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted."); *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992) ("Mere conclusory allegations are not competent summary judgment evidence, and they are therefore insufficient to defeat or support a motion for summary judgment.").

D. FUNDAMENTAL UNFAIRNESS.

While a circuit court may have the discretion to grant de facto summary judgment to the loser in district court, this Court recently emphasized that *fairness* is the key to the exercise of that discretion. In *Weisgram v. Marley Co.*, ___U.S.___, 120 S. Ct. 1011 (2000), Marley repeatedly objected prior to trial, and at trial, to the admissibility of the testimony of Weisgram's expert witnesses, but the district court overruled the objections, and Weisgram prevailed in district court. 120 S. Ct. at 1015–16. Concluding that the expert testimony should have been excluded, and that the remaining evidence was insufficient as a

matter of law to support a verdict in favor of Weisgram, the Eighth Circuit, reversed and, pursuant to Rule 50(a), Federal Rules of Civil Procedure, granted Marley judgment as a matter of law.[6] *Id.* at 1016. Affirming, this Court held:

> As *Neely* recognized, appellate rulings on post-trial pleas for judgment as a matter of law call for the exercise of "informed discretion," 386 U.S. at 329, 87 S. Ct. 1072, and *fairness to the parties is surely key to the exercise of that discretion.*

Id. at 1020 (emphasis supplied). The Court noted that, although Weisgram "was on notice every step of the way that Marley was challenging his experts, he made no attempt to add or substitute other evidence." *Id.* at 1021.

In this case, the State, in its motion for summary judgment on collateral review in the district court, contended that Smith had *procedurally defaulted* the claim of ineffective assistance based on the theory that counsel should have presented lay testimony about alleged multiple personalities. Because procedural default means that the district court should not address the merits, the State's assertion of that defense was certainly the functional equivalent of Marley's objections in the district court to Weisgram's proposed expert testimony. Although Marley had notice of Weisgram's reliance on proposed expert witnesses—and so could timely object in district court—in this case *Smith never put the State on notice, in state or federal court, that he placed any reliance on Dr. Tatro's report in support of his substantive argument on ineffective assistance.* Under those circumstances, it was fundamentally unfair for the Ninth Circuit to use that report, along with the hearsay attributed to Maddox and Lippiett, to grant judgment as a matter of law to Smith without giving the State the chance to test those allegations at a hearing, and to present rebuttal evidence.

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6. The standard for granting summary judgment mirrors the standard for directing a verdict as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

The Ninth Circuit's use of Dr. Tatro's report to reverse was wrong as a matter of law for a separate reason. In *Edwards v. Carpenter*, ___U.S.___, 120 S. Ct. 1587 (2000), this Court held that a defaulted claim of ineffective assistance cannot serve as cause to excuse another defaulted claim unless the state prisoner can show cause and prejudice to excuse the procedurally defaulted ineffective assistance of counsel claim. 120 S. Ct. at 1591. Moreover, this Court held that the principles of comity and federalism require the defendant to first present the defaulted ineffective assistance claim *to the state courts as an independent constitutional claim* before he can present it to the federal courts as cause to excuse another defaulted claim. *Id.*

In this case, the district court ruled that Dr. Tatro's report—which was never submitted to the state courts—did not excuse procedural default on numerous issues because it did not satisfy the fundamental miscarriage of justice exception. App. B at 7–9. The Ninth Circuit *affirmed* that ruling by explicitly agreeing that the district court correctly held numerous issues procedurally barred. App. A at 7. The Ninth Circuit then proceeded to use that *same report*—never presented to the state courts, and insufficient to demonstrate a fundamental miscarriage of justice—to *reverse* a grant of summary judgment in the State's favor.

By analogy to *Edwards*, Smith should not have been able to use Dr. Tatro's report to assert a fundamental miscarriage of justice in the district court, or for any other purpose, without first presenting it to the state courts as an independent constitutional claim. Thus, the Ninth Circuit erred egregiously by using a report *deliberately withheld from the state courts*—and insufficient to establish a fundamental miscarriage of justice—as the basis for reversing a grant of summary judgment in the State's favor and ordering a new sentencing.

It is clear that, without Dr. Tatro's report, the underpinnings of the majority's rationale for ordering a new sentencing would crumble. The majority speculated that Dr. Tatro's opinion, formed 8 years after the resentencing, was the vital missing link that would have convinced the

trial court that Smith was significantly impaired at the time of the crimes, and spared him two death sentences.[7] App. A at 19.

If, as Rule 56 requires, the unsubstantiated hearsay allegations attributed to Maddox and Lippiett, and Dr. Tatro's report, are eliminated, the only evidence that complied with Rule 56 was Richard Todd's deposition. In view of the fact that none of the six experts who examined Smith prior to trial saw any indication of multiple personalities, Todd's lay testimony that Smith "appeared" to exhibit another personality at times is certainly not enough to reverse the district court's grant of summary judgment in favor of the State, and to grant de facto summary judgment to Smith.

E. IRRECONCILABLE CONFLICT WITH *WALLACE* AND *CORRELL*.

Even if this Court believes that the majority permissibly overturned the district court's grant of summary judgment in favor of the State, the proper remedy was not to automatically grant a new sentencing. In fact, that remedy was clearly improper and cannot be reconciled with the Ninth Circuit's decisions in *Wallace v. Stewart*, 184 F.3d 1112 (9th Cir. 1999), and *Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998), two other capital cases from Arizona. The district court granted the State's motion for summary judgment in *Wallace* and *Correll*, just as it did in this case. On appeal, the Ninth Circuit found that the state prisoners had presented sufficient evidence to support a claim that they had received ineffective assistance of counsel at sentencing. However, instead of automatically granting those petitioners a new sentencing, the Ninth Circuit remanded those cases to the district court for an evidentiary hearing to see if the state prisoners could establish their *Strickland* claims:

> *Because there was no hearing, the State did not have an opportunity to cross-examine Wallace's affiants, or to present*

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7. While the majority also held that trial counsel should have presented the lay testimony of Todd, Maddox, and Lippiett (App. A at 18), it is evident that the decisive, synergistic factor in their analysis was Dr. Tatro's report.

> *evidence of its own. Nor, of course, did the district court make any findings.* However, were the district court to *accept* all of Wallace's evidence, it *could find* that Wallace's lawyers were ineffective, and conclude that "there is a reasonable probability that the death sentence would not have been imposed" had they been effective. . . . We therefore remand for an evidentiary hearing and findings as to whether Couser and Curtis were ineffective and, if so, whether Wallace was prejudiced as a consequence.

Wallace, 184 F.3d at 1118 (9th Cir. 1999) (emphasis supplied).

In contrast to *Wallace* and *Correll*, where the Ninth Circuit recognized the basic unfairness of granting a new sentencing when the State has not had the opportunity to cross-examine potential defense witnesses at an evidentiary hearing, or to present evidence of its own in rebuttal, the Ninth Circuit simply dispensed with the notion of basic fairness in this case and granted a new sentencing without permitting the State to test the evidence at a hearing. At a minimum, the Ninth Circuit should have remanded this case to the district court for an evidentiary hearing.

II

STRICKLAND'S REQUIREMENT THAT THE DEFENDANT SHOW *ACTUAL PREJUDICE* DOES NOT PERMIT A FEDERAL COURT TO GRANT A RESENTENCING ON THE BASIS OF SPECULATION ABOUT THE EFFECT OF A REPORT NEVER PRESENTED TO THE STATE COURTS.

A. General Legal Principles.

1. *Ineffective Assistance of Counsel.*

To obtain relief on a claim of ineffective assistance of counsel, a state prisoner must show that counsel made errors that a reasonably competent attorney acting as a diligent and conscientious advocate

would not have made. *Strickland*, 466 U.S. at 688–91. Moreover, even if a state prisoner can show that counsel's performance fell below objective standards of reasonableness, he must also demonstrate actual prejudice flowing from counsel's performance. *Id.* at 692–96. That is, the prisoner must demonstrate that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

2. *Arizona Law on Aggravation and Mitigation.*

In Arizona, if the State proves *one* aggravating circumstance beyond a reasonable doubt, the trial court must impose the death penalty unless the defendant can produce *sufficiently substantial mitigation* to warrant leniency. A.R.S. § 13–703(E). The defendant has the burden of *proving* an alleged mitigating factor by a preponderance of the evidence. *State v. Djerf*, 959 P.2d 1274, 1286 (Ariz. 1998); *State v. White*, 815 P.2d 569, 581 (Ariz. 1991). If the defendant establishes the existence of potential mitigation, the trial court has the discretion to determine how much weight to give the proffered mitigation. *State v. Salazar*, 844 P.2d 566, 579 (Ariz. 1992). The sentencer considers not merely the number of aggravating and mitigating circumstances, but the *gravity* of them. *State v. Gretzler*, 659 P.2d 1, 13 (Ariz. 1983); *State v. Brookover*, 601 P.2d 1322, 1326 (Ariz. 1979). One aggravating circumstance may be so substantial that multiple mitigating circumstances will not be "sufficiently substantial to call for leniency." *Brookover*, 601 P.2d at 1326.

In Arizona, the trial court is the sentencer and, therefore, determines the credibility of all witnesses. On appeal, the Arizona Supreme Court reviews the aggravation and mitigation *de novo* to determine the propriety of the death penalty. *Djerf*, 959 P.2d at 1286; *Salazar*, 844 P.2d at 579.

B. DISCUSSION.

1. *Aggravation.*

In this case, the State proved *three* aggravating circumstances. The trial court found that Smith had been previously convicted of three rapes, for which a life sentence was imposable, and that each of the murder convictions in this case was an aggravating circumstance with respect to the other murder conviction because each was punishable by a sentence of life imprisonment or death. The trial court also found that the three rape convictions[8] supported the finding of a second aggravating circumstance, conviction of a felony involving the use or threat of violence on another person.

In addition, the trial court found that Smith murdered Sandy Spencer and Neva Lee in an especially heinous, depraved, and cruel manner. This finding was amply sustained by the numerous wounds inflicted, and the brutal and prolonged asphyxiation of the victims caused by Smith's forcing dirt into their mouths and nostrils, taping their mouths shut, then repeatedly stabbing each victim.

2. *Speculative Mitigation.*

The Ninth Circuit majority faulted Smith's counsel for not presenting evidence at resentencing through Richard Todd, Larry Maddox, Debbie Lippiett, and Dr. Tatro to bolster the admittedly "inexplicit and equivocal" opinions of Drs. Goldberg and Hoogerbeets, who essentially diagnosed Smith as a borderline psychotic who may have killed compulsively. App. A at 19. With the exception of Todd's deposition, Smith has never supplied affidavits or depositions from Maddox, Lippiett, or Dr. Tatro setting forth, under oath, specific facts

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8. The district court held procedurally barred Smith's attack on counsel for not successfully arguing against the use of the prior rape convictions as aggravating circumstances. After explicitly *affirming* that bar (App. A at 7, n. 1), the majority ignored it in its *Strickland* analysis and faulted counsel for not challenging the use of the rape convictions to establish aggravation. App. A at 16.

to which they supposedly would have testified in 1979. The Ninth Circuit, therefore, reversed this case on the basis of *hearsay*, and on the basis of what the majority *speculated* would be the effect of such hearsay on the sentencer. The State contends that *Strickland* does not permit a federal court to reverse a state case on collateral review on the basis of sheer speculation.

Using Dr. Tatro's report, the majority also assumed that Smith—who was almost 27 when he killed—had a "disturbing family background." App. A at 19.[9] Even if Smith could establish that new assertion as fact, it is *not* a substantial mitigating circumstance unless he can show a definite causal link between that background and his ability to control his conduct at the time of the offenses. *State v. Greene*, 967 P.2d 106, 117 (Ariz. 1998) (27-year-old defendant failed to show how anything in his background, including his mother's introducing him to methamphetamine, influenced his behavior on the night of the murder); *State v. Jones*, 917 P.2d 200, 219–20 (Ariz. 1996) (although defendant had a chaotic and abusive childhood, that was not mitigating because he did not establish a connection between his childhood and his conduct when he murdered).

The majority's speculation that Dr. Tatro *might* have supplied a causal link, and that the trial court *might* have found it credible and

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9. This "difficult childhood" concept does not appear in the presentence report or in the reports of the six experts who examined Smith prior to trial. Mr. Titterington, who had Dr. Tatro's report when he filed the third petition for post-conviction relief in March 1988, did not make such a contention. To the contrary, he faulted trial counsel for not impressing on the trial court the fact that Smith had a perfectly *normal* childhood:

> Mr. Smith had led a completely normal life during his youth and teenage years, and was not considered by anyone to be the type of person capable of committing violent sexual crimes such as the murders of Neva Lee and Sandy Spencer.

Mr. Titterington made the identical assertion of a normal childhood in the amended federal habeas petition filed in April 1992. The majority opinion fails to mention these facts.

given it such weight that it would have *substantially outweighed the three aggravating circumstances,* is no substitute for the requirement of Arizona law that Smith *prove* the causal link by a preponderance of the evidence.

In the absence of an evidentiary hearing where the State could cross-examine defense witnesses, and present rebuttal evidence, the Ninth Circuit has implicitly assumed that the following sequence of events would all have flowed uninterruptedly in Smith's favor: (1) that the defense would have established, as fact, bare assertions; (2) that the trial court would have found all defense witnesses credible and persuasive; (3) that the State could not have cross-examined the defense witnesses effectively, or rebutted them with other experts; and (4) that, if the trial court had found the defense witnesses credible, and the evidence to be mitigating, it would have given the evidence such great *weight* that there is a "reasonable probability" that it would have outweighed *three* powerful aggravating circumstances. In other words, *the majority has assumed what Strickland requires Smith to demonstrate.* The State asserts that *Strickland* does not allow reversal on the basis of speculation.

C. THE DISSENT.

Dissenting from the grant of a new sentencing, Judge Fernandez began by recognizing the gravity of the aggravating circumstances with which defense counsel had to deal: three prior rape convictions and the horrendous manner in which Smith murdered Neva Lee and Sandy Spencer. App. A at 22–23. What Smith had done "was surely egregious." *Id.* at 24. Judge Fernandez noted that the record indicated a perfectly normal childhood and adolescence, that "Smith insisted that his childhood (always a favorite source of mitigating evidence) had been normal." *Id.* He pointed out that none of the six experts who examined Smith prior to trial found any mental impairment severe enough to affect his ability to participate in court proceedings or to assist counsel, none of them found that Smith was incapable of appreciating the nature and quality of the offenses when he committed

them, and none of them detected multiple personalities. *Id.* at 24–25.

Turning to the *Strickland* analysis, Judge Fernandez reasoned:

> Smith must still show that he was prejudiced. . . . He must show that, ultimately, there was a reasonable probability that the Arizona Supreme Court "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." . . .
>
> Can Smith meet the *Strickland* prejudice standard? I think not. I am, of course, cognizant of the difficulties presented by prejudice assessment in a case where we must ask ourselves what effect further evidence would have had on the sentencing judges. . . . But Smith was no mine-run killer. We cannot say, as we have said before, that "while the facts of this case are bad enough to disturb even a jaded observer, they do not reach the level of those cases where the aggravating facts were so overwhelmingly horrifying that it was highly improbable that mitigating factors of any ordinary stripe would help." . . . This *was* the kind of case that cried out for powerful mitigation if Smith's life was to be saved. This is the kind of case about which we have said that the defendant "sentenced himself to death" and that "no plea for mercy or leniency on [his] behalf, indeed no oral argument on his behalf could have altered what [he] himself set in motion." . . . Counsel's sentencing failures did not prejudice Smith.
>
> If we take off our legal lenses for a moment and step back to look at this record and at what Smith did to his unfortunate victims, the decision to return this case for resentencing almost takes one's breath away . . . . And even with our glasses back in place, the thought that some lay opinion about a split personality would have caused the trial court to flinch from awarding Smith the death penalty does

> startle one. With all due respect, legal lenses should not be blinders.

App. A at 26–27 (emphasis in original; citations omitted).

In the context of the entire record, Judge Fernandez's *Strickland* analysis is, with due respect, simply more realistic and objective than that of the majority, which relies heavily on speculation derived from a post-sentencing report never submitted to the state courts.

CONCLUSION

Based on the foregoing authorities and arguments, the State respectfully requests this Court to grant the petition for writ of certiorari, reverse the Ninth Circuit, and affirm the district court's denial of relief. In the alternative, the State requests that the Court grant certiorari and order the Ninth Circuit to remand the case to the district court for a hearing to determine whether Smith can establish actual prejudice.

Respectfully submitted,

JANET NAPOLITANO
Attorney General

PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section

JACK ROBERTS
Assistant Attorney General
(Counsel of Record)

Attorneys for PETITIONERS

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Joe Clarence Smith, Jr., *Petitioner-Appellant,*	)	No. 97-99010
v.	)	D.C. No. CIV-91-01577-PGR
Terry L. Stewart, *Respondent-Appellee.*	)	OPINION

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District Judge, Presiding

Argued and Submitted
January 28, 1999—Pasadena, California

Filed August 31, 1999

Before: Warren J. Ferguson, Stephen Reinhardt, and
Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Ferguson;
Partial Concurrence and Partial Dissent by Judge Fernandez

SUMMARY

CRIMINAL LAW AND PROCEDURE/DEFENDANTS AND ACCUSED, RIGHTS OF

The court of appeals reversed a sentencing order of the district court. The court held that counsel's failure to present any mitigating evidence on behalf of a defendant at sentencing is ineffective assistance of counsel.

Appellant Joe Smith was convicted in Arizona state court for the particularly heinous murders of two women. Smith had previously been convicted of rape.

At sentencing, Smith's trial counsel, Stephen Rempe, offered the deposition testimony of a psychiatrist, Dr. Jacob Hoogerbeets, and the live testimony of a psychologist, Dr. Faye Goldberg. At that time, Arizona's death penalty statute restricted the presentation of mitigating evidence to a list of statutory mitigating factors. Rempe offered the doctors' testimony solely to establish one statutory mitigating factor: significant impairment of Smith's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law.

Dr. Hoogerbeets, who originally had been appointed by the court to evaluate Smith's competency to stand trial, told the court at that time that Smith did not suffer from any mental disability. With no additional interviews of Smith, Hoogerbeets testified in his deposition presented at sentencing that Smith was a borderline psychotic who may have had a "compulsion" to commit the crimes.

Dr. Goldberg also testified that Smith had a "compulsion" to kill. The state rebutted with the testimony of a psychiatrist who determined that Smith was not impaired in his ability to conform his conduct to the law and suffered from no significant mental defect and presented evidence of Smith's rape convictions as aggravating factors. The court found no mitigating circumstances and three aggravating circumstances warranting the death penalty.

On appeal, the Arizona Supreme Court remanded Smith's case for resentencing in light of changes to the state's death penalty statute under which Rempe could have presented any mitigating evidence on behalf of Smith, including any additional evidence of mental illness.

Instead, at Smith's resentencing, Rempe simply resubmitted Dr. Hoogerbeets' and Dr. Goldberg's testimony under the same statutory mitigating factor, without recalling them to testify or presenting other evidence of mental or emotional disturbance. Rempe did not call any other witnesses.

There was some evidence of Smith's mental illness available to Rempe: a court-appointed investigator reported to Rempe that he had witnessed Smith's multiple personalities during their conversations; at Smith's rape trial, a friend of Smith's, a pastor, told the prosecutor that Smith possessed multiple personalities; Smith's former girlfriend testified during the rape trial that Smith suffered from wide-ranging mood swings.

Another psychologist, Dr. Donald Tatro, who interviewed Smith, administered tests and researched his family, concluded that Smith had a split personality arising from a disturbing family background. When circumstances caused the two selves to overlap, the conflict became so unbearable that Smith would lose contact with reality, Dr. Tatro explained. Smith's reaction corresponded to his well-documented mood swings from depression to paranoia. Smith attempted suicide in prison.

Rempe had never tried a death penalty case before and he had no idea what mitigating evidence he could present. The court ignored his request for help.

At resentencing, the judge found that Dr. Hoogerbeets' and Dr. Goldberg's testimony alone did not support the statutory mitigating factor of significant impairment, and so did not consider the prosecution's rebuttal testimony. The court also said it was not limiting its consideration of any mitigating circumstance in concluding that no mitigating factors existed that would call for a sentence other than death.

Rempe reargued the constitutionality of Arizona's death penalty statute, repeated the recommendation of a supplemental presentence

report, which suggested that the court appoint another examining psychiatrist, and briefly argued that life in prison would be a more heinous punishment than death. The court again found aggravating circumstances and no mitigating circumstances in sentencing Smith to death.

The Arizona Supreme Court affirmed Smith's conviction and death sentence. After post-conviction relief petitions in the state courts were decided adversely to him, Smith proceeded with federal habeas action in the district court. The district court denied the writ. The district court, however, reached the merits of Smith's claim of ineffective assistance of counsel at resentencing.

Smith appealed, arguing *inter alia* that Rempe's performance had constituted ineffective assistance of counsel.

[1] To establish ineffective assistance of counsel, Smith had to demonstrate that his counsel's performance at his resentencing was deficient, falling outside the wide range of professionally competent assistance. The deficient performance also had to have prejudiced his case. There had to have been a reasonable probability, sufficient to undermine confidence in the outcome, that the result of the proceeding would have been different but for counsel's errors.

[2] Rempe's performance was deficient. He failed to investigate, develop, and present evidence of Smith's mental condition that did not rise to the level of the statutory mitigating factor of significant impairment. He failed to introduce any additional mitigating evidence that might call for leniency. He failed to call any witnesses on Smith's behalf at the resentencing.

[3] The failure to present mitigating evidence during the penalty phase of a capital case, where there are no tactical considerations involved, constitutes deficient performance, since competent counsel would have made an effective case for mitigation. Failure to investigate a defendant's mental condition as a mitigating factor in a penalty phase

hearing, without a supporting strategic reason, constitutes deficient performance.

[4] As a result of the Arizona Supreme Court's remand for resentencing, Rempe could have presented *any* evidence bearing on Smith's mental and emotional condition, as well as his background and character, that might have avoided the death penalty. Instead, he did nothing. He did not do any investigation. He did not even recall Dr. Hoogerbeets and Dr. Goldberg for additional testimony about Smith's mental condition irrespective of his "compulsive" tendencies at the time of the crimes. There was other evidence Rempe could have raised that would have strengthened the case for mitigation. His own investigator witnessed evidence of multiple personalities. A friend of Smith's who was also a pastor believed that Smith possessed multiple personalities. An investigation into his family background would have revealed that Smith suffered from serious psychosexual problems stemming from developmental problems and conflicts with his parents. His antisocial, egocentric, paranoid, manic and impulsive behaviors marked Smith with a sociopathic or psychopathic character disorder. Rempe also could have pointed to Smith's good relationship with his girlfriend.

[5] The failure to investigate Smith's background and mental illness was not a strategic decision. Rempe had never tried a death penalty case before. In an affidavit submitted to the court, Rempe admitted that he did not investigate Smith's case for mitigating evidence, even though he had more than four months to prepare for the resentencing. He did not understand what evidence constituted mitigating evidence.

[6] Rempe ignored the prosecutor's doubts at Smith's guilty plea hearing as to Smith's lack of emotional stability. Rempe should have seized the opportunity to pursue any supporting evidence about Smith's background and mental condition, but he did not. In addition, Rempe failed to attack the prosecutor's use of his prior rape convictions to aggravate his sentence. Rempe effectively presented no defense on Smith's behalf, amounting to abandonment of his client to the fate of death.

[7] Because of Rempe's failure to provide competent representation, confidence in the outcome of Smith's sentencing was undermined. Arizona's death penalty statute mandates the death penalty if there is at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. For each of the killings, the presence of the other murder, Smith's prior rape convictions, and heinous nature of the crimes established aggravating circumstances. It was therefore critical that counsel attempt to investigate and present the strongest possible case for mitigation.

[8] Additional evidence of Smith's mental illness and background was readily available to Rempe that might have had an effect on the sentencing judge. At least, information regarding the possibility that Smith had multiple personalities should have been given to Smith's psychiatric experts to strengthen their conclusions. Without it, Smith's defense was undercut. A lawyer who should have known but does not inform his expert witnesses about essential information going to the heart of the defendant's case for mitigation does not function as counsel under the Sixth Amendment.

[9] Dr. Tatro showed how Smith's split personality arose from his disturbing family background. Dr. Goldberg apparently had interviewed Smith's family and friends about his background and character, but this information was given almost no attention in her testimony. In Arizona, character and personality disorders can be weighed as nonstatutory mitigating evidence. A difficult family background also may be mitigating if it significantly impacts the defendant's ability to control his actions.

[10] Heinous crimes do not make mitigating evidence irrelevant. It could not be said with any confidence that information about the split nature of Smith's personality would not have led a sentencing judge to conclude that Smith was not deserving of the death penalty. Remand was required for resentencing.

Judge Fernandez wrote separately to dissent, stating that because Smith's crimes were so horrifying, even if Rempe had presented the mitigating evidence available to him, it would not have changed the outcome of his sentence.

COUNSEL

Kelley J. Henry and Denise I. Young, Assistant Federal Public Defender, Phoenix, Arizona, for the petitioner-appellant.

Gerald R. Grant, Maricopa County Attorney, Phoenix, Arizona, for the respondent-appellee.

OPINION

FERGUSON, Circuit Judge:

Arizona state prisoner Joe Clarence Smith ("Smith") appeals the denial of his habeas corpus petition seeking review of his conviction and death sentence for the 1976 murders of Neva Lee and Sandy Spencer. Smith raised 34 claims, all of which the district court found were procedurally defaulted or lacked merit. For the bulk of these claims, we affirm the denial of the petition for the reasons set forth in the district court's order and memorandum.[1] We focus instead on one

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1. Smith does not appeal all 34 claims. The claims which he does appeal and which the district court denied or found procedurally barred include the following: (1) ineffective assistance of counsel at trial; (2) Smith's guilty plea in the Spencer murder was taken in violation of *Boykin v. Alabama*, 395 U.S. 238 (1969); (3) Smith's guilty plea was coerced by threats; (4) Smith's guilty plea lacked a factual basis; (5) Smith was improperly tried for murder by torture in the Lee homicide; (6) the murder by torture instruction did not set out the elements of the offense; (7) Smith was denied a unanimous jury on the elements of murder by torture; (8) Smith's arrest in this case was pretextual; (9) the Arizona courts failed to consider mitigating evidence fully in ordering the death penalty; (10) the trial court used unconstitutional convictions to establish aggravating circumstances; (11) the trial court improperly considered victim impact evidence during sentencing; (12) the trial judge improperly applied Smith's prior convictions to establish two aggravating factors; (13) the trial (continued...)

claim that Smith raised in previous state post-conviction petitions: ineffective assistance of counsel at resentencing. Because we conclude that Smith's counsel effectively presented no mitigating evidence on his behalf, our confidence in the outcome of his sentencing has been undermined to such an extent that we must reverse the district court.

I. BACKGROUND

On January 1, 1976, officials of the Maricopa County Sheriff's Department found the nude body of Sandy Spencer in the desert outside Phoenix. One month later in a different desert location, police discovered the nude body of Neva Lee. Both teenage hitchhikers had been suffocated by having dirt forced into their mouths, which were taped shut. The assailant stabbed both women multiple times, punctured them with needles, and bound their wrists with rope.

Smith, who was on probation from a rape conviction, became the prime suspect. Police put him under surveillance. When that failed to produce probable cause for an arrest, police had a female officer pose as a hitchhiker to lure Smith into committing false imprisonment or battery. He eventually picked up the officer, took her to his father's machine shop, and grabbed her by both arms. After a prearranged signal, police entered and arrested him for false imprisonment.

During Smith's imprisonment, police questioned him about the Lee and Spencer murders. At first, he denied his involvement. But months later, at his own initiation, Smith gave investigators a bizarre account of the Lee slaying. He told police that he was present at the crime because a friend, John Jameson, forced him at gunpoint to drive the victim to the desert. Once there, Jameson ordered Lee to have sexual

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1. (...continued)
court improperly used the Spencer conviction to establish aggravating factors in the Lee conviction; (14) the trial court impermissibly duplicated an aggravating factor; (15) one aggravating factor was unconstitutionally vague; (16) the prosecution failed to disclose *Brady* material relevant to sentencing; and (17) the sentencing judge unconstitutionally refused to appoint a psychiatric expert. We reject these claims for the same reasons discussed by the district court.

intercourse with Smith in order to frame Smith for her rape. Smith said Jameson then decided to kill Lee. His account conflicted with some physical evidence found at the scene. Smith later contended that he told police no such story.

Smith went on trial for the Lee murder first. Throughout the trial, he maintained his innocence, contending that other people committed the crime and that investigators conspired to frame him. Jameson testified at the trial. He denied being present at the murder, but said that a man known as "Squirrel" bragged about killing two women and showed Jameson pictures of the dead women. The jury returned a general verdict finding Smith guilty of murder.

Smith then went on trial for the Spencer slaying. The following day, he pleaded guilty to the crime shortly after DiAnne Jameson—Smith's girlfriend, John Jameson's ex-wife, and a key prosecution witness—told the court that she had been improperly contacted by a defense investigator and by Smith's mother. During the plea colloquy, the prosecutor expressed doubts about Smith's emotional stability to enter a voluntary plea. Nonetheless, the trial court accepted the plea. Three weeks later, Smith unsuccessfully sought to withdraw the plea, explaining that he had only pleaded guilty out of concern that his parents and Ms. Jameson would be arrested.

At Smith's sentencing for both convictions, his trial counsel, Stephen Rempe, offered the deposition testimony of a psychiatrist, Dr. Jacob Hoogerbeets, and the live testimony of a psychologist, Dr. Faye Goldberg. At that time, Arizona's death penalty statute, formerly A.R.S. § 13–454, restricted the presentation of mitigating evidence to a list of statutory mitigating factors. Rempe offered Hoogerbeets' and Goldberg's testimony solely to establish one statutory mitigating factor: significant impairment of Smith's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law.

Dr. Hoogerbeets originally had been appointed by the court to evaluate Smith's competency to stand trial in March 1977. At that time, Hoogerbeets told the court that Smith did not suffer from *any*

mental disability. Nonetheless, by July, with no additional interviews of Smith, Hoogerbeets testified in his deposition that Smith was a borderline psychotic who may have had a "compulsion" to commit the crimes. During the August sentencing, Dr. Goldberg also testified that Smith's emotional tension built up to such an extent that at the time of crimes he had an overwhelming "compulsion" to kill. The state rebutted this compulsion theory with the testimony of psychiatrist Dr. Michael Cleary, who also had interviewed Smith to determine his competency to stand trial. Dr. Cleary, after an hour interview, determined that Smith was not impaired in his ability to conform his conduct to the law and suffered from no significant mental defect. The court found no mitigating circumstances and three aggravating circumstances warranting the death penalty.

On appeal in 1979, the Arizona Supreme Court remanded Smith's case for resentencing in light of changes to the state's death penalty statute.[2] Rempe now could present any mitigating evidence on behalf of Smith, including additional evidence of mental illness not rising to the level of an impairment of Smith's capacity to conform his conduct to the law. Instead, at Smith's resentencing, Rempe simply resubmitted Dr. Hoogerbeets' and Dr. Goldberg's testimony under the same statutory mitigating factor, without recalling them to testify or presenting other evidence of mental or emotional disturbance. In fact, Rempe had never tried a death penalty case before and he had no idea what mitigating evidence he could present. He even asked the court to help him out, a request that was ignored.

At resentencing, the judge found that Dr. Hoogerbeets' and Dr. Goldberg's testimony alone did not support the statutory mitigating factor of significant impairment, and so the court said it would not consider Dr. Cleary's testimony. The court also said it was not limiting its consideration of any mitigating circumstance in concluding that no

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2. In July 1978, the Arizona Supreme Court held that A.R.S. § 14–454(F) was unconstitutional because it restricted a defendant's right to present relevant mitigating evidence other than the statutory factors. *State v. Watson*, 586 P.2d 1253 (Ariz. 1978). Accordingly, the legislature revised the death penalty statute, now A.R.S. § 13–703. A.R.S. § 13–703(G) allows a defendant to present any relevant mitigating circumstance.

mitigating factors existed which would call for a sentence other than death. In addition to resubmitting this expert testimony, Rempe reargued the constitutionality of Arizona's revised death penalty statute, a standard "form" motion of the public defenders officer. He also repeated the recommendation of a supplemental presentence report, which suggested that the court appoint another examining psychiatrist. The court denied the request. Repeating his unsuccessful argument from Smith's first sentencing, Rempe briefly argued that life in prison would be a more "heinous" punishment than death. The court again found aggravating circumstances and no mitigating circumstances in sentencing Smith to death.

On direct appeal, the Arizona Supreme Court affirmed Smith's conviction and death sentence. *State v. Smith*, 638 P.2d 696 (Ariz. 1981). He then brought a series of post-conviction relief petitions in the state courts. After the third of those petitions was decided adversely to him, Smith proceeded with the current federal habeas action in the district court. The district court denied the writ, finding all but seven of Smith's 34 claims procedurally barred either because the trial court determined they were defaulted, they were not preserved in a motion for rehearing, or they were never presented to any state court. The district court, however, reached the merits of Smith's claim of ineffective assistance of counsel at resentencing. Although Smith raises a number of claims on appeal, we need to consider only one.

II. STANDARD OF REVIEW

We review *de novo* the district court's grant of summary judgment denying a writ of habeas corpus. *Correll v. Stewart*, 137 F.3d 1404, 1411 (9th Cir. 1998). Since Smith filed this habeas petition before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, the provisions of the Act do not apply. *Id.* (citing *Jeffries v. Wood*, 114 F.3d 1484, 1495-96 (9th cir. 1997 (en banc)).

III. DISCUSSION

[1] To establish ineffective assistance of counsel, Smith must demonstrate that his counsel's performance at his resentencing was deficient, falling "outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). The deficient performance also must prejudice his case. There must be a reasonable probability, sufficient to undermine confidence in the outcome, that the result of the proceeding would have been different but for counsel's errors. *Id.* at 64.

A. *Deficient Performance*

[2] We have no doubt that Rempe's performance was deficient. He failed to investigate, develop, and present evidence of Smith's mental condition which did not rise to the level of the statutory mitigating factor of significant impairment. He failed to introduce any additional mitigating evidence that might call for leniency. He failed to call any witnesses on Smith's behalf at the resentencing. This case is more akin to those situations in which defense counsel failed to present any mitigating evidence at all.

[3] The failure to present mitigating evidence during the penalty phase of a capital case, where there are no tactical considerations involved, constitutes deficient performance, since competent counsel would have made an effective case for mitigation. *See Bean v. Calderon*, 163 F.3d 1073, 1079 (9th Cir. 1998); *Smith v. Stewart*, 140 F.3d 1263, 1269 (9th Cir. 1998); *Correll v. Stewart*, 137 F.3d 1404, 1412 (9th Cir. 1998); *Clabourne v. Lewis*, 64 F.3d 1373, 1384 (9th Cir. 1995) (failure to call witnesses, introduce evidence of defendant's history of mental illness, or to argue any mitigating circumstance besides defendant's mental condition at time of the offense). Likewise, "failure to investigate [the defendant's] mental condition as a mitigating factor in a penalty phase hearing, without a supporting strategic reason, constitutes deficient performance." *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995). *See also Wallace v. Stewart*, No. 97-99016, 1999 WL 511348, *3-4 (9th Cir. July 21, 1999) *Caro v. Calderon*, 165

F.3d 1223, 1226 (9th Cir. 1999) (all relevant evidence must be unearthed for consideration at a capital sentencing hearing).

For Smith's first sentencing in 1977, Rempe presented the testimony of Dr. Hoogerbeets and Dr. Goldberg. The entire focus of this testimony was to prove that Smith met the only mitigating factor available to him under Arizona law at that time: that Smith's ability to conform his conduct to the law at the time of the crimes was significantly impaired. Both doctors, therefore, focused on "inner conflicts" and "tension" that Smith suffered which would have caused a compulsion to act at the time of the crimes. Dr. Hoogerbeets described Smith's problem as "compulsory aberrant actions." The thrust of Dr. Goldberg's testimony was to present Smith as a "multiple sadistic sex slayer" who kills under a compulsion in order to reduce his mounting emotional tension. As Dr. Goldberg put it, the tension "mounts to such an extent that the intellectual processes are suspended and accompanying that may be a loss of memory about the events, partially or completely." This compulsion theory was necessary to provide any mitigation for Smith under the prior invalid statute. It is significant that both Dr. Hoogerbeets and the state's rebuttal psychiatrist, Dr. Cleary, originally had been asked to evaluate Smith to determine if he met the M'Naghten test for legal insanity. Arizona's statutory mitigating factor requires a similar, though less stringent, focus on the defendant's ability to behave "normally" *at the time of the crimes*.

Even at the first sentencing, Dr. Hoogerbeets' testimony had severe credibility problems. His insanity evaluation described Smith as having no mental disabilities. Yet a few months later, with no further evaluation, he testified that Smith was a borderline psychotic. Moreover, he only interviewed Smith for an hour. It is not surprising that the trial judge and the Arizona Supreme Court discounted his testimony.

[4] Yet by the time of Smith's resentencing in 1979, his attorney had no qualms about resting on the testimony of these two experts, whose opinions the court previously rejected as not rising to the level

of mitigation. Even the Arizona Supreme Court found the testimony of these experts to be "inexplicit and often equivocal." *State v. Smith*, 638 P.2d, 696, 701 (Ariz. 1981). As a result of the Arizona Supreme Court's remand for resentencing, Rempe now could present *any* evidence bearing on Smith's mental and emotional condition, as well as his background and character, that might avoid the penalty of death. Instead, he did nothing. He did not do any investigation. He did not even recall Dr. Hoogerbeets and Dr. Goldberg for additional testimony about Smith's mental condition irrespective of his "compulsive" tendencies at the time of the crimes. It is clear that there was other evidence counsel could have raised that would have strengthened the case for mitigation. The defense's own investigator witnessed evidence of multiple personalities. A friend of Smith's who was also a pastor believed that Smith possessed multiple personalities. An investigation into his family background would have revealed that Smith suffered from serious psychosexual problems stemming from developmental problems and conflicts with his parents. His antisocial, egocentric, paranoid, manic and impulsive behaviors marked Smith with a sociopathic or psychopathic character disorder. Rempe also could have pointed to Smith's good relationship with his girlfriend. *See Smith v. Stewart*, 140 F.3d 1263, 1271 (9th Cir. 1998) (noting that good family relationships are relevant mitigating evidence).

[5] The failure to investigate Smith's background and mental illness was not a strategic decision. Rempe had never tried a death penalty case before. In an affidavit submitted to the court, Rempe admitted that he did not investigate Smith's case for mitigating evidence, even though he had more than four months to prepare for the resentencing. He did not understand what evidence constituted mitigating evidence. An exchange with the judge is illustrative of Rempe's complete failure to provide even a minimal defense to help spare Smith from death:

> REMPE: I only have really one area of mitigation that I was asking the Court to consider and that was under the old statute where the defendant knew right from wrong but yet it was still a McNaughton [sic] defense. I don't know how that reading, the new statute or reading *State v. Watson* stating that we can

present any mitigating circumstances, I don't know what posture I would have to present that in other than to reurge the Court to consider . . . the deposition of Dr. Hoogerbeets and the testimony of Dr. Goldberg, taking the standard that was enunciated in the code as to a possible mitigating factor, but I really show my ignorance—

How would that work in *State v. Watson*? We are to consider all relevant mitigating factors. I don't know what the standard is now. Therefore, I am in essence asking the court what our stand would be.

COURT: I would suggest that you present anything you, in your opinion or imagination, feel is a mitigating circumstance.

REMPE: The only two things, as I had indicated, would be what the State said they already read . . . . I would move both of those items [Hoogerbeets' and Goldberg's testimony] to be introduced in evidence and to be considered by the Court as mitigation and as to any argument, it will be rather brief and I would make it the day of sentencing.

At the sentencing hearing, the prosecution offered no additional evidence. Rempe briefly argued that the new death penalty statute still suffered from constitutional problems, even though two other courts had rejected that argument. He asked the sentencing judge to consider the recommendation of a probation officer in the supplemental presentence report to appoint another psychiatric expert, a request the court rejected based on what it perceived as a lack of supporting evidence from Hoogerbeets and Goldberg. Finally, Rempe reiterated the few sentences that he made at the first sentencing: "If we are looking to punish Mr. Smith, I can't think of a more heinous type of punishment than to lock someone up at the Arizona State Prison for the rest of his life."

[6] Furthermore, Rempe even ignored the prosecutor's own doubts at Smith's guilty plea hearing as to Smith's lack of emotional stability.

The prosecutor's comment should have set off fireworks for Rempe. He should have seized the opportunity to pursue any supporting evidence about Smith's background and mental condition, but he did not. In addition, for no apparent tactical reason, Rempe failed to attack the prosecutor's use of his prior rape convictions to aggravate his sentence. There was some evidence that the attorney representing him in his 1974 rape conviction labored under an actual conflict of interest. Moreover, a relevant argument existed that Smith's 1974 and 1976 rape convictions did not support one aggravating factor that the judge found: that they were prior felony convictions involving the use or threat of violence. At the time of the convictions, rape could be committed in Arizona without the use or threat of violence. *See* A.R.S. § 13–611. This argument was available to Rempe in 1979. In all, there is no doubt that Rempe effectively presented no defense on Smith's behalf, amounting to abandonment of his client to the fate of death.

In similar circumstances, we previously have found deficient performance. In *Clabourne v. Lewis*, 64 F.3d 1373 (9th Cir. 1995), defense counsel did not call any witnesses, introduce any evidence of the defendant's history of mental illness, or argue any other mitigation besides his mental condition at the penalty phase of a capital case. Like Rempe, Clabourne's attorney argued briefly that Arizona's death penalty statute was unconstitutional, and, as mitigating evidence, he only resubmitted evidence presented at trial to establish Clabourne's insanity.

As proof that Clabourne's attorney was deficient, we noted several problems that are replicated here. First, we said that the fact that the government rested on its evidence of mental illness at trial and made no further argument is proof that Clabourne's attorney failed to bring forth anything new at sentencing. Likewise, the government here rested on the evidence and argument presented at Smith's first sentencing. Next, we noted as deficient performance the failure of Clabourne's attorney to have his trial experts expound on the case for mitigation since the focus of these witnesses was on whether Clabourne met the test for legal insanity. In fact, defense counsel had argued before sentencing that one of those experts, Dr. Berlin, should have been provided the

opportunity to supplement his testimony about Clabourne's mental state since his focus at trial was on showing Clabourne's psychosis and possible insanity. In light of this admission that the case for mitigation was incomplete, we said that the attorney's "failure to call Dr. Berlin, or to put on any additional evidence at the sentencing hearing is inexplicable." *Id.* at 1385 n.19. We concluded that Clabourne's representation at sentencing amounted in every respect to no representation at all. *Id.* at 1387. Surely Smith's complete unawareness that he could recall Dr. Hoogerbeets and Dr. Goldberg for additional explanation is equally deficient without any supporting tactical reason.

Likewise, in *Hendricks v. Calderon*, 70 Fl.3d 1032, 1043 (9th Cir. 1995), Hendrick's attorney failed to re-investigate his client's mental defenses in the sentencing phase of his capital case, even though he had presented evidence of mental impairment at the guilt phase. In that case, the defense had actually introduced a psychologist, Dr. Carson, to testify to Hendrick's past history of problems. We noted that lack of corroboration of Carson's testimony about his difficult childhood and mental problems, as well as the state's effective cross-examination, undermined the value of the testimony. *Id.* at 1044. We once again concluded the case "is more akin to those cases in which no mitigating evidence was put on." *Id.*

More recently, in *Bean v. Calderon*, 163 F.3d 1073, 1080 (9th Cir. 1998), we reached the same conclusion after defense counsel failed to adequately prepare his penalty phase experts for their testimony and failed to conduct an adequate investigation. We found that the limited preparation and informational foundations for the mental health experts' conclusions severely undercut the effectiveness and persuasiveness of Bean's penalty phase defense. *Id.* at 1080-81. In *Wallace v. Stewart*, No. 97-99016, 1999 WL 511348, at *5 (9th Cir. July 21, 1999), we again recognized the duty of defense counsel "to seek out [evidence of the defendant's background] and bring it to the attention of the experts." The limited time Dr. Hoogerbeets and Dr. Goldberg spent with Smith and the narrow focus of their evaluation leads to the conclusion that they did little to aid Smith's fight for life, and any

reasonably competent counsel at his resentencing would have at least recalled them or bolstered their testimony.

B. *Prejudice*

[7] Because of Rempe's failure to provide competent representation, our confidence in the outcome of Smith' sentencing has been undermined. Arizona's death penalty statute mandates the death penalty if there is at least one aggravating circumstance and "no mitigating circumstances sufficiently substantial to call for leniency." *See* A.R.S. § 13–703(E). For each of the Lee and Spencer killings, the presence of the other murder, Smith's prior rape convictions, and heinous nature of the crimes established aggravating circumstances. It was therefore "critical" under this scheme and in Smith's particular circumstances that counsel attempt to investigate and present the strongest possible case for mitigation. *See Smith*, 140 F.3d at 1270 (citing *Evans v. Lewis*, 855 F.21d 631, 637 (9th Cir. 1988).

[8] Additional evidence of Smith's mental illness and background was readily available to Rempe which, cumulatively, might have had an effect on the sentencing judge. Richard Todd, a court-appointed investigator, witnessed Smith's "second personality" during their conversations. Smith had called himself John Jameson and talked as if he was Jameson on several occasions. His manner would change and he talked in the third person, at one time revealing the location of other murders. Todd told Rempe of these conversations. A friend of Smith's, Rev. Larry Maddox, also told the prosecutor during Smith's 1976 rape trial that Smith possessed multiple personalities. Rempe could have learned this information from Smith's previous attorney. Smith's former girlfriend, Debbie Lippiett, testified during the rape trial that Smith suffered from wide-ranging mood swings. At least, this information should have been furnished to Smith's psychiatric experts to strengthen their conclusions, making their testimony less "inexplicit and equivocal" to the judge. Without it, Smith's defense was undercut. *See Bean*, 163 F.3d at 1081. A lawyer who should have known but does not inform his expert witnesses about essential information going to the heart of the defendant's case for mitigation does not function as

"counsel" under the Sixth Amendment. *See Caro v. Calderon*, 165 F.3d 1223, 1228 (9th Cir. 1999).

In addition, other experts were needed to corroborate Dr. Goldberg's testimony, by far the more thoroughly researched testimony of Smith's two experts. *See Hendricks*, 70 F.3d at 1044. For example, another psychologist, Dr. Donald Tatro, later interviewed Smith, administered tests and researched his family background. Like Dr. Goldberg, Dr. Tatro concluded that Smith had a "split personality," compartmentalizing himself into a "positive" and "negative" self. Smith normally kept these personalities separated, but when circumstances caused the two selves to overlap, the conflict became so unbearable that Smith would lose contact with reality, Dr. Tatro explained. This may be why Smith steadfastly maintained his innocence for the crimes, the doctor noted. Smith's reaction also corresponded to his well-documented mood swings from depression to paranoia. Smith even attempted suicide in prison.

[9] Dr. Tatro showed how Smith's split personality arose from his disturbing family background. Raised in a deeply religious family, his father severely beat him whenever Smith defied him, and ignored him other times. His mother, on the other hand, was overly protective of Smith because of his asthmatic condition but abruptly distanced herself when Smith became a teenager. Smith developed two sides to his personality to keep his rage at bay. Dr. Goldberg apparently had interviewed Smith's family and friends about his background and character, but this information was given almost no attention in her testimony. In Arizona, character and personality disorders can be weighed as nonstatutory mitigating evidence. *See State v. Kayer*, No. CR-97-0280-AP, 1999 WL 432599, at *15-16 (Ariz. June 28, 1999). A difficult family background also may be mitigating if it significantly impacts the defendant's ability to control his actions. *See State v. Medina*, 975 P.2d 84, 107 (Ariz. 1999).[3]

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3. Despite the dissent's skepticism, it is clear that the failure to find further information about the defendant's psychiatric problems was due in large part to the fact that his lawyer had (continued...)

When we consider the effect of the failure to present mitigating evidence in light of the aggravating circumstances present in this case, we must remember that

> [we] are not asked to imagine what the effect of certain testimony would have been upon us personally. We are asked to imagine what the effect might have been upon a sentencing judge . . . . Mitigating evidence might well have one effect on the sentencing judge, without having the same effect on a different judicial officer.

Smith v. Stewart, 140 F.3d 1263, 1270 (9th Cir. 1998). The task described is not an easy one, and we must avoid any inclination to allow ourselves to be influenced by our own personal revulsion at the specifics of the crime. We are aided in that effort by our obligation under *Strickland* to reverse if our confidence in the sentence is undermined. We previously have found *Strickland*'s prejudice prong met where we concluded that defense counsel effectively presented no mitigating evidence at sentencing, despite the presence of aggravating factors. In *Hendricks*, 70 F.3d at 1045, for example, we stated that defense counsel's "failure to present the abundant and available background information . . . in any credible form fully satisfied the prejudice required under *Strickland*." We have done the same with respect to failures of counsel in the sentencing phase of a capital case in Arizona, because under Arizona's statute the judge must impose the death penalty in the absence of mitigating evidence. *See Correll v. Stewart*, 137 F.3d 1404, 1413 (9th Cir. 1997) (finding prejudice

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3. (...continued)
never tried a capital case, and did not understand the concept of mitigating evidence. Even the prosecutor, on the record, had doubts about Smith's mental state. Moreover, while the dissent describes the results of psychological evaluations to determine the defendant's competency to stand trial, ability to assist counsel, and mental capacity for purposes of the insanity defense, the dissent neglects to mention that a psychologist charged with the responsibility of determining whether or not Smith suffered mental problems for the purpose of determining if it was relevant mitigating evidence concluded that Smith did in fact have a split personality. Rather than presenting evidence that the same judge already had rejected, Smith's counsel should have presented new mitigating evidence that was available. His failure to do so constituted ineffective assistance.

established where Correll's attorney failed to present any evidence of mental illness sufficient to satisfy Arizona law). Here, Rempe's failure to do anything but offer evidence that the sentencing judge clearly rejected the first time around was a virtual admission his client should be put to death.

[10] The horrific nature of the crimes involved here does not cause us to find an absence of prejudice. In *Hendricks*, we rejected the argument that heinous crimes make mitigating evidence irrelevant, noting that the factfinder in California has broad latitude to weigh the worth of the defendant's life. 70 F.3d at 1044. Moreover, despite the dissent's suggestion that a sufficiently brutal crime obviates the need for mitigating evidence, we have found prejudice where the presentation of mitigating evidence was wholly inadequate in cases involving crimes as horrific as committed here. *See Wade v. Calderon*, 29 F.3d 1312, 1315, 1323-25 (9th Cir. 1994).[4] Testimony by a doctor that Smith lost contact with reality during his violent outbursts, which were themselves a result of psychological tension built up between the two sides of his split personality, could have led a judge to feel that he was not deserving of the ultimate punishment. Thus, we cannot say with any confidence that information about the split nature of Smith's personality would not have led a sentencing judge to conclude that Smith was not deserving of the death penalty. *Cf. Evans v. Lewis*, 855 F.2d 631, 637-38 (9th Cir. 1988) (finding prejudice and reversing Arizona sentence without analysis of nature of crime, where defense involved schizophrenia). Mindful of the fact that "the Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy," *Hendricks*, 70 F.3d

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4. The dissent cites *Gerlaugh v. Stewart*, 129 F.3d 1027, 1042 (9th Cir. 1997), for the proposition that in some cases no mitigating evidence could prevent the death penalty. However, *Gerlaugh* stands only for the proposition that the absence of mitigating evidence may be irrelevant when no substantial mitigating evidence is available. The full context of the statement quoted is that "*[g]iven of all of this* . . . no plea for mercy or leniency" could have saved the petitioner. 129 F.3d at 1042 (emphasis added). The "this" includes the fact that, in the panel's judgment, "Gerlaugh could muster no substantial mitigating circumstances, and he has been unable to do so to this date notwithstanding the dogged efforts of his able attorneys." *Id. Gerlaugh* cannot be applied to a case where substantial mitigating evidence was available.

at 1044 (quoting *Deutscher v. Whitley*, 884 F.2d 1152, 1161 (9th Cir. 1989) (vacated on other grounds)), we remand for resentencing.

IV. CONCLUSION

Smith was denied effective assistance of counsel at resentencing. We reverse the district court's denial of habeas corpus and remand with directions that it issue a writ releasing Smith from the sentence of death and directing that he be resentenced. We affirm the district court on the remainder of Smith's claims.

AFFIRMED in part, REVERSED and REMANDED in part.

FERNANDEZ, Circuit Judge concurring and dissenting:

I agree with the rejection of most of Smith's claims, but dissent from the grant of habeas corpus regarding his sentence.

Almost twenty-four years ago, Smith committed two crimes of unspeakable cruelty and brutality. I detail some of Smith's background and the facts of those crimes here because, though very briefly alluded to by the majority, a fuller description will reify the nightmare that counsel had to address when he was called upon to plead for Smith's life. We must understand that counsel was not faced with a mere legal abstraction. Neither were Smith's unfortunate victims.

By early 1975, Smith, who was then twenty-five years old, was already on probation for two first degree rapes. The leniency with which he had been treated for those 1973 convictions allowed him to continue to pursue his nefarious career. He began what would come to be a notorious series of desert rapes of female hitchhikers in the Phoenix area. In February 1975, Smith raped and sodomized a pregnant woman to whom he had offered a ride. *See State v. Smith*, 116 Ariz. 387, 389, 569 P.2d 817, 819 (1977). In July, Smith and a companion kidnapped, raped and viciously stabbed a fifteen-year-old girl, who was hitchhiking. *See State v. Smith*, 123 Ariz. 243, 246, 599

P.2d 199, 202 (1979). Those two incidents prefaced the subsequent murderous attacks which are the subject of this case.

In December of 1975, Smith took eighteen-year-old Sandy Spencer into the desert. There he stripped her and killed her by forcing dirt into her mouth and nose, which resulted in her death by asphyxiation due to the obstruction of her breathing passages. Not being satisfied with that cruelty, he also stabbed her 19 to 20 times in the groin and pelvic area, including inside her vagina. In addition, he stabbed her in both breasts and left a two and half inch sewing needle imbedded in her left breast and chest wall. All of these wounds were inflicted while she was still alive. Sadly enough, that did not satiate his appetites.

A month or less later, Smith picked up fourteen-year-old Neva Lee. She, too, was carried off to the desert, where Smith raped her and then murdered her by the same methods he had used on Sandy Spencer. He forced dirt into her mouth, larynx and trachea, down into her windpipe and both lungs. He also taped her mouth shut. She, too, died of asphyxiation. Again, Smith saw fit to inflict still further suffering upon her. She was stabbed at the left side of her vulva, and sustained tears in her vulva and vagina, all prior to her death. She had been bound hand and foot and had been stabbed in the breasts with something like a sewing needle. She also had numerous other bruises and wounds on her body, some inflicted before she died, and some at about the time she died or thereafter.

Those were the facts about Smith's actions that counsel had to grapple with. After Smith had been convicted of Neva Lee's murder, he pled guilty to Sandy Spencer's murder in the midst of his trial for that crime. He was then sentenced to death for those murders, but counsel obtained a new sentencing hearing for him at which counsel was told that he could place "any mitigating circumstance" before the sentencing court. *See State v. Smith*, 123 Ariz. 231, 243, 599 P.2d 187, 199 (1979). Counsel was not sure just what evidence could be

considered mitigating. Given the constellation of facts with which he was faced, that is understandable.[1]

What his client had done was surely egregious. But what of Smith's background? Well, Smith insisted that his childhood (always a favorite source of mitigating evidence) had been normal. He had been raised by his natural parents, had no real conflicts with them, and grew up with them and his sister. Indeed, he was close to his mother and father and could not recall any significant difficulties or any particularly traumatic event. There was no history of psychiatric problems or drug or alcohol abuse in his family. Smith was popular in school and graduated from high school, after which he attended college. His father was a machinist, and Smith worked at his father's shop during the relevant time. (It was there, by the way, that he tried to put upon a female undercover police officer, which ultimately brought his murderous career to an end.) There was not much mitigation there one would think. What to do?

Largely at counsel's request, Smith had been examined by no less than six mental health professionals, psychiatrists all. None of them found any mental impairment severe enough to have affected Smith's ability to participate in court proceedings, and to assist counsel. More than that, none thought that Smith was incapable of appreciating the nature and quality of the offenses when he committed them, and one psychiatrist opined that Smith was not suffering from any mental illness or defect at the time. Be that as it may, counsel made the sentencing judge aware of Dr. Hoogerbeets' opinion that Smith was mentally disturbed, "'a border-type psychotic person, with an abnormal psycho-sexual development, very strong neurotic traits, which drives him to compulsory aberrant actions. Unfortunately, often highly deviant and

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1. Counsel asked the learned trial judge for guidance. Perhaps the judge was just as puzzled, or perhaps he had the wisdom not to say anything that might limit the possibilities. At any rate, he said "I would suggest that you present anything you, in your opinion or imagination, feel is mitigating circumstance." Had the judge been more specific or detailed, he might have been accused later of having inhibited or misled the defense. *See, e.g., Wilson v. United States District Court (Siripongs)*, 161 F.3d 1185, 1886-87 (9th cir. 1998).

violent in nature.'" *State v. Smith*, 131 Ariz. 29, 32, 638 P.2d 696, 699 (1979). Another psychiatrist, Dr. Goldberg, opined that Smith was a sadistic sexual slayer who is possibly psychotic and who had poor ego control along with, perhaps, compulsive behavior "over which [he had] little control." *Id.* at 32-33, 638 P.2d at 699-700. If a judge were inclined to find mitigating circumstances, that testimony, if believed, would surely have led to a conclusion that there was some mitigation. *See id.; see also, id.* at 35, 638 P.2d at 702. There was psychiatric evidence on the other side which the Arizona Supreme Court ultimately accepted, but that is not the point of this discussion. The point is that the possibly mitigating psychiatric evidence was known to counsel, and was placed before the Arizona Courts by him. Not satisfied with that, counsel asked for still another psychiatric expert; that was denied.

What else might there be? There was his behavior in jail and in prison. That can be a factor, but the information was before the sentencing court, as counsel and the court knew.

In the face of all of that, counsel did still argue for his client's life and did attack the Arizona death penalty statute itself. Moreover, he appealed when he lost, and he argued for his client's life in the Arizona Supreme Court. But counsel did not do further investigation. That was because he had a failure of imagination, or of legal acumen, or both. Had he investigated, what, after all of these years, has been discovered that would mitigate the powerful aggravating circumstances arrayed against Smith? The district court was told that two lay witnesses would have indicated that Smith seemed to have multiple personalities,[2] and one lay witness would say that Smith had wide mood swings. Of course, none of the mental health professionals had detected multiple personalities. I am highly dubious about dubbing the failure to discover this asthenic mitigating evidence as being so far outside the range of the competence we expect from attorneys that counsel "was not functioning

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2. Interestingly enough, one of those supposed "personalities" was named John Jameson, which just happened to be the name of the prosecution's witness who Smith said committed the Lee murder. Smith had been dating Jameson's estranged wife.

as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

But let us take counsel at his word. Let us agree with him that his confusion, lack of acumen, lack of imagination, even ennui in this death penalty case was outside the range of tolerable attorney behavior. Let us say, in other words, that because it was not simply tactics that kept him from presenting the additional information, his behavior was not reasonable. *Cf. Bonin v. Calderon*, 59 F.3d 815, 834 (9th Cir. 1995). Smith must still show that he was prejudiced. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. That is, he must show that the result of his sentencing is not reliable. *Id.* He must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068. He must show that, ultimately, there was a reasonable probability that the Arizona Supreme Court "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S. Ct. at 2069.

Can Smith meet the *Strickland* prejudice standard? I think not. I am, of course, cognizant of the difficulties presented by prejudice assessment in a case where we must ask ourselves what effect further evidence would have had on the sentencing judges. *See Smith v. Stewart*, 140 F.3d 1263, 1270-71 (9th Cir. 1998) (*Bernard Smith*). But Smith was no mine-run killer. We cannot say, as we have said before, that "while the facts of this case are bad enough to disturb even a jaded observer, they do not reach the level of those in cases where the aggravating facts were so overwhelmingly horrifying that it was highly improbable that mitigating factors of any ordinary stripe would help." *Bernard Smith*, 140 F.3d at 1271. This *was* the kind of case that cried our for powerful mitigating, if Smith's life was to be saved. This is the kind of case about which we have said that the defendant "sentenced himself to death," and that "no plea for mercy or leniency on [his] behalf, indeed no oral argument on his behalf, could have altered what [he] himself set in motion." *Gerlaugh v. Stewart*, 129 F.3d 1027, 1042 (9th Cir. 1997). Counsel's sentencing failures did not prejudice Smith.

If we take off our legal lenses for a moment and step back to look at this record and at what Smith did to his unfortunate victims, the decision to return this case for resentencing almost takes one's breath away, if, indeed, it is not too incongruous to say that anything touching a process as slow as that which exists in this country[3] can ever be called breathtaking. And even with our glasses back in place, the thought that some lay opinion about a split personality would have caused the trial court to flinch from awarding Smith the death penalty does startle one. With all due respect, legal lenses should not be blinders.

Therefore, I respectfully dissent from the grant of habeas corpus on the sentencing claim, although I concur in the rejection of the other claims.

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3. Twenty-three years and counting in this case.

APPENDIX B

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Jan 21 1997
Clerk U S District Court
District of Arizona
By_____Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

JOE CLARENCE SMITH, JR.,	)	No. CIV-91-1577-PHX-PGR
	)	
Petitioner,	)	
	)	JUDGMENT ORDER
vs.	)	
	)	
SAMUEL LEWIS, et al.,	)	
	)	
Respondents.	)	

This action came on for consideration before the Court, the Honorable Paul G. Rosenblatt, United States District Judge, presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that Respondents' Motion for Summary Judgement is granted, Petitioner's Petition for Writ of Habeas Corpus and all amendments thereto is denied, and the stay of execution previously imposed by this Court is vacated.

IT IS FURTHER ORDERED that the Clerk of the Clerk [sic] send copies of this Judgment Order to all counsel of record.

DATED this 21st day of January, 1997.

S/_____
Paul G. Rosenblatt
United States District Judge

X Filed _____Lodged
___Received _____Copy
Jan 21 1997
Clerk U S District Court
District of Arizona
By_____Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

JOE CLARENCE SMITH, JR.,	)	No. CIV-91-1577-PHX-PGR
	)	
Petitioner,	)	
	)	
vs.	)	MEMORANDUM OF
	)	DECISION AND ORDER
TERRY STEWART, et al.,[1]	)	
	)	
Respondents.	)	
	)	

Pending before the Court is Respondents' Motion for Summary Judgment requesting that the court deny all relief sought by Petitioner

1. Upon Samuel Lewis' retirement on December 15, 1995, Terry Stewart was appointed Director of the Arizona Department of Corrections. Meg Savage replaced Roger Crist as the warden of the Arizona State Prison, Florence Complex. The substitution of parties is made pursuant to F.R.C.P. 25(d)(1).

in his Amended Petition for Writ of Habeas Corpus. For the reasons stated herein, the Court grants Respondents' Motion for Summary Judgment and denies Petitioner's Amended Petition.[2]

PROCEDURAL AND FACTUAL BACKGROUND[3]

On January 1, 1976, the body of Sandy Spencer was found in the desert outside of Phoenix, Arizona. On February 2, 1976, another body was found at a different location in the desert which was determined to be that of Neva Lee. Both victims were teenage hitchhikers and were killed within less than one month of each other. Both girls died of asphyxiation from having dirt forced into their mouths which were taped closed. Both of the nude bodies exhibited various stab wounds made by a similar knife, puncture wounds made by sewing needles, and rope marks around the wrists from being bound by rope of the same size.

On November 4, 1976, an indictment was filed charging Petitioner with two counts of first-degree murder for the deaths of Sandy Spencer and Neva Lee. The two counts were severed, and on June 7, 1977, a jury convicted Petitioner of Count II, first-degree murder of Neva Lee. On July 7, 1977, after trial commended on Count I, Petitioner entered a plea of guilty to first-degree murder of Sandy Spencer. Petitioner later moved to withdraw his guilty plea, which the trial court denied. On August 31, 1977, after a consolidated aggravation-mitigation hearing was held, the trial court sentenced Petitioner to death on each first-degree murder count.

On July 13, 1979, the Arizona Supreme Court affirmed the convictions, but remanded the case for resentencing to allow Petitioner to present any evidence in mitigation. State v. Smith, 123 Ariz. 231,

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2. The Court has not applied the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, to this case, in light of Jeffries v. Wood, No. 95-99003, 1996 WL 730493 (9th Cir. Dec. 20, 1996).

3. A more complete procedural history may be found in the Court's Order entered on May 14, 1996. (File doc. 100.)

599 P.2d 187 (1979). On November 7, 1979, the trial court again sentenced Petitioner to death on each count finding the existence of three aggravating circumstances and no mitigating circumstances requiring leniency. On December 7, 1981, the Arizona Supreme Court affirmed the death sentences. State v. Smith, 131 Ariz. 29, 638 P.2d 696 (1981).

Thereafter, Petitioner filed three post-conviction relief petitions in the trial court pursuant to Rule 32 of the Arizona Rules of Criminal Procedure (Exs. F, N, V),[4] which were denied. (Exs. I, P, Q, Y.) The Arizona Supreme Court denied each of Petitioner's petitions for review. (Exs. L, T, BB.)

Petitioner also filed two prior petitions for writ of habeas corpus in this Court which were interspersed among the filing of the Rule 32 petitions. The habeas petitions were dismissed without prejudice because they contained unexhausted claims and were, therefore, mixed petitions pursuant to Rose v. Lundy, 455 U.S. 509 (1982). (Exs. M, U.)

On October 3, 1991, Petitioner filed the pending petition for writ of habeas corpus in this Court. (File doc. 1.) The petition was amended on April 27, 1992 (File doc. 25), and Respondents filed a motion for summary judgment on July 1, 1993. (File doc. 65.) On October 26, 1993, Petitioner filed his response to the motion for summary judgment (File doc. 84), and on January 28, 1994, Respondents filed their reply. (File doc. 92.)

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4. Exhibits A through T accompanied Respondents' motion to dismiss Petitioner's second habeas corpus petition, CIV 87-497-PHX-PGR. The Court has ordered that these exhibits be copied and made a part of the instant court file. Exhibits U through BB accompanied Respondents' motion for summary judgment filed in this proceeding as document 25. Hereinafter documents that are a part of the district court's file will be designated as "file doc.__." The Court will refer to the state court pleadings as "ROA" and state minute entries by date as "Min. E." "R.T." refers to the reporter's transcripts.

PROCEDURALLY BARRED CLAIMS

On May 14, 1996, the Court entered an Order which found the following claims raised in the amended petition to be procedurally defaulted: 1-A through 1-F, 1-H, 2 through 12, 14 in part (whether the malice instruction was improper because it did not include the term "malice aforethought" and because the phrase "a person has . . . malice" created a mandatory presumption), 15, 16, 17 in part (whether the factual basis for Petitioner's guilty plea was deficient given the court's leading questions), 18 in part (whether counsel rendered ineffective assistance for failing to present additional mitigation evidence during resentencing and to attack the prior convictions used as aggravating circumstances), 19, 20 in part (whether the trial court failed to consider evidence of impaired mental capacity to establish a nonstatutory mitigating circumstance and to consider good behavior in prison as mitigation), 21 through 26, and 28 through 34. (File doc. 100.) Petitioner was given the opportunity to brief cause and prejudice or a fundamental miscarriage of justice to excuse the procedural defaults. Respondents filed a response.

The Court now must determine whether Petitioner has established legitimate cause and actual prejudice to excuse the defaults and allow the claims to be decided on the merits. For each claim Petitioner must show both cause and prejudice. If Petitioner fails to establish legitimate cause, the Court need not decide the issue of actual prejudice. The Court will also address Petitioner's argument that a fundamental miscarriage of justice will result if these claims are not heard on the merits.

Cause and Prejudice Analysis.

Ordinarily "cause" to excuse a default exists if a petitioner can demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman v. Thompson, 501 U.S. 722, 753 (1991). Objective factors which constitute cause include interference by officials which makes compliance with the state's procedural rule impracticable, a showing

that the factual or legal basis for a claim was not reasonably available to counsel, and constitutionally ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 488 (1986). "Prejudice" is actual harm resulting from the alleged constitutional error. Magby v. Wawrzaszek, 741 F.2d 240, 244 (9th Cir. 1984).

Petitioner contends that the excessive caseload of his first post-conviction counsel and the abdication of responsibility by his second post-conviction counsel constitute ineffective assistance of counsel. Thus, relying on Coleman, 501 U.S. 722, Petitioner attempts to excuse the procedural default for all claims by arguing that his third post-conviction relief proceeding was the first opportunity to present claims with the effective assistance of counsel. Petitioner made this same argument in his response to the motion for summary judgment as a "defense" to the alleged procedural defaults, and the Court rejected it in its Order of May 14, 1996. (File doc. 100 at 25-27.) Petitioner has filed a motion asking the Court to reconsider this ruling; however, the Court finds that Petitioner has not presented newly discovered evidence or identified manifest errors of law or fact to warrant the Court's reconsideration. Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied, 476 U.S. 1171 (1986). (See discussion of Petitioner's motion for reconsideration infra at 10.) In fact, in an opinion filed after this Court's holding, the Ninth Circuit reaffirmed its ruling that the ineffectiveness of post-conviction counsel does not constitute cause because there is no constitutional right to post-conviction counsel. See Poland v. Stewart, __ F.3d __, No. 95-99022, 1996 WL 741525 at *11 (9th Cir. Dec. 31, 1996); see also Nevius v. Sumner, Nos. 86-2878, 96-80322, 96-99015, 1996 WL 722931 at *7 (9th Cir. Dec. 11, 1996) (ineffectiveness of habeas counsel not cause because no constitutional right to habeas counsel exists even though habeas proceeding was first opportunity to raise the claim). Petitioner has failed to show cause to excuse the procedural defaults.

Given the Court's ruling that Petitioner has failed to show cause, the Court need not determine whether Petitioner has adequately shown prejudice with respect to the defaulted claims. See Smith v. Murray, 477 U.S. 527, 533 (1986) (finding that failure to establish cause to

overcome a state procedural default obviates the need to inquire into actual prejudice). However, the Court has reviewed the parties' briefs regarding cause and the entire state court record and finds Petitioner was not actually harmed by any of the alleged errors.

Fundamental Miscarriage of Justice.

Having found no cause and prejudice, the Court may only reach the merits of the procedurally defaulted claims if Petitioner shows a fundamental miscarriage of justice would occur if the merits of the claims are not addressed. The "fundamental miscarriage of justice" exception is also known as the "actual innocence" exception. This exception may be satisfied if a petitioner is either 1) "innocent of the death sentence," Sawyer v. Whitley, 505 U.S. 333, 339 (1992), or 2) is actually innocent of the capital crime. Murray v. Carrier, 477 U.S. 478, 496 (1986).

Petitioner seeks relief from the procedural defaults only on the basis of actual innocence of the death penalty. Therefore, Petitioner must show by clear and convincing evidence that, but for a constitutional error, no reasonable sentencer would have found him eligible for the death penalty under the applicable Arizona statute. Sawyer, 505 U.S. at 345. Particularly, Petitioner must show by clear and convincing evidence that no reasonable sentencer would find the existence of all three aggravating factors the sentencing court found. The existence of additional mitigating evidence that could have been presented but for the constitutional error does not make Petitioner ineligible for the death sentence. Id. at 345-47. The Supreme Court's rationale for this test of actual innocence of the death penalty is as follows:

> But we reject petitioner's submission that the showing [of actual innocence] should extend beyond these elements of the capital sentence to the existence of additional mitigating evidence. In the first place, such an extension would mean that "actual innocence" amounts to little more than what is already required to show "prejudice," a necessary showing for habeas relief for many constitutional errors.

Id. at 345 (citations omitted). The Supreme Court continued in a footnote:

> If a showing of actual innocence were reduced to actual prejudice, it would allow the evasion of the cause and prejudice standard which we have held also acts as an "exception" to a defaulted, abusive or successive claim. In practical terms a petitioner would no longer have to show cause, contrary to our prior cases.

Id. at n. 13 (citations omitted).

Petitioner, nevertheless, contends that, because Arizona is a weighing state, the appropriate standard is whether a reasonable sentencer would have found him "eligible for the death penalty by concluding that there was no mitigating circumstance sufficiently substantial to outweigh the existing aggravating circumstances." (File doc. 105 at 22-23.)[5] Petitioner argues that a psychological examination conducted by Dr. Tatro in 1987 reveals additional mitigation evidence that outweighs the existing aggravating circumstances.

The Court disagrees with Petitioner's statement of the applicable standard. The Arizona Supreme Court has clearly stated that in Arizona a defendant is eligible for the death penalty if the defendant has been convicted of first-degree murder and if the State has proven beyond a reasonable doubt at least one aggravating circumstance. State v. Stokley, 182 Ariz 505, 516, 898 P.2d 454, 465 (1995), cert. denied, 116 S. Ct. 787 (1996); State v. West, 176 Ariz. 432, 449, 862 P.2d 192, 209 (1993) cert. denied, 114 S. Ct. 1635 (1994); State v. Greenway, 170 Ariz. 155, 164, 823 P.2d 22, 31 (1991). Mitigation evidence is considered only when determining whether the death penalty should be

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5. Petitioner incorrectly mixes the "more likely than not" standard for determining whether a petitioner is innocent of the capital offense, Schlup v. Delo, 513 U.S. 298, ___, 115 S. Ct. 851, 867 (1995), with the more stringent "clear and convincing" standard of Sawyer. See Moran v. McDaniel, 80 F.3d 1261, 1277 n.3 (9th Cir. 1996).

imposed after the defendant is determined to be eligible for the death penalty. State v. Barreras, 181 Ariz. 516, 521, 892 P.2d 852, 857 (1995). Cf. Deutscher v. Angelone, 16 F.3d 981, 984 (9th Cir. 1994) (petitioner would not have been sentenced to die but for counsel's failure to present mitigating evidence and challenge an unconstitutional aggravating factor under Nevada law); Moran v. McDaniel, 80 F.3d 1261, 1273 (9th Cir. 1996) (petitioner attacked constitutionality of aggravating factor; court considered balance of mitigating factors against aggravating factors under Nevada law).

In conclusion, claims regarding errors in the submission or consideration of mitigation evidence do not relate to a "condition of eligibility" and cannot form a basis for relief under the fundamental miscarriage of justice exception. Having only argued that Dr. Tatro's psychological report establishes additional mitigation evidence, Petitioner cannot show actual innocence of the death penalty.[6] The Court will not address the merits of any claim found to be procedurally defaulted in the May 14, 1996 Order.

Motion for Reconsideration

Motions to reconsider are appropriate only in rare circumstances. See Sullivan v. Faras-RLS Group, Ltd., 795 F. Supp. 305, 308-09 (D. Ariz. 1992). "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied, 476 U.S. 1171 (1986). A motion for reconsideration should not be used to ask the court "to rethink what the court had already thought through--rightly or wrongly." Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983).

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6. The Court notes that Dr. Tatro's psychological evaluation is not substantially different from the opinions expressed by Drs. Hoogerbeets and Goldberg during the sentencing. All three have opined that Petitioner suffered from borderline personality disorder and may have experienced compulsive behavior. Therefore, the Court finds that Petitioner could not meet his heavy burden of actual innocence even under Petitioner's proposed standard that considers additional mitigation evidence.

In addition to the Coleman/ineffective assistance of counsel issue discussed above, Petitioner asks the Court to reconsider its ruling that the Arizona Supreme Court's review for fundamental error does not preserve any constitutional claim for habeas review. According to Petitioner, the Court misperceived the scope of Arizona's mandatory appellate review for fundamental error which caused the Court to erroneously distinguish Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993), cert. denied, 114 S. Ct. 1631 (1994). Petitioner has presented no new arguments or newly discovered evidence to support a finding that the Court's ruling was a manifest error of law or fact. In fact, the Court notes that the Ninth Circuit has once again recently affirmed this Court on precisely this issue. Poland v. Stewart, ___ F.3d ___, No. 95-99022, 1996 WL 741525 at *11 (9th Cir. Dec. 31, 1996) (petitioner's reliance on Beam is misplaced).

Petitioner also asks the Court to reconsider its finding of preclusion as to Petitioner's claim that Arizona's "heinous, cruel, or depraved" aggravating circumstance was unconstitutionally vague. Petitioner contends that presenting this claim to the state courts would have been futile considering the Arizona Supreme Court's recent rejection of the same argument in State v. Mata, 185 Ariz. 319, 916 P.2d 1035, cert. denied, 117 S. Ct. 20 (1996); therefore, the procedural default is excused. Respondents correctly point out that it would not have been futile for Petitioner to present this claim to the state courts at the time he should have presented this claim. Petitioner misapplies the futility doctrine.[7] Petitioner's motion for reconsideration is denied.

RESOLUTION ON THE MERITS

Claim 1-G: Counsel Failed to Investigate Witness' Prior Felony Convictions.

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7. The futility docrine as an excuse to procedural default is arguably no longer viable. See Engle v. Isaac, 456 U.S. 107, 130 (1982); Noltie v. Peterson, 9 F.3d 802, 805 (9th Cir. 1993) (questions validity of futility doctrine).

In claim 1-G Petitioner contends that his trial counsel were ineffective for failing to discover John Jamison's three prior felony convictions, which counsel should have used to impeach Jamison. Respondents counter that Petitioner was not prejudiced by counsel's failure to discover Jamison's prior convictions because the defense strategy was to present Jamison as a credible witness.

On September 25, 1976, while in custody on other charges, Petitioner confessed to being present during the murder of Neva Lee but contended that Jamison, a one-time friend, actually killed the victim and forced Petitioner to engage in sexual acts with her. According to Petitioner, Jamison secretly entered Petitioner's car at a convenience store and forced him at gun point to pick up the victim and drive to a remote part of the desert. (R.T., 6/7/77 at 94-96.) Once there, Jamison tied Petitioner's hands behind his back and ordered the victim to remove Petitioner's clothes (leaving his shoes on) and engage in intercourse with Petitioner against his will. (Id. at 97-98.) Jamison proceeded to bind the victim with rope from Petitioner's car and tape her mouth using tape from Petitioner's first aid kit in order to make the "rape" look realistic. (Id. at 98.) Jamison then stabbed the victim using Petitioner's knife that was in Petitioner's car and dragged her out of the car. (Id. at 99.) Petitioner followed the victim into the desert where he saw Jamison stab the victim again. (Id. at 100.) Jamison then cut Petitioner's hands loose and ordered Petitioner to take the tape off the victim's mouth, cut her loose and drag her into the bushes. (Id.) When Petitioner rolled the victim over to remove the tape and just before she died, the victim said, "I'm sorry." (Id.) Petitioner then obeyed Jamison's orders to unbind the victim's arms and legs, remove her clothes and move her body into a bush. (Id. at 101.) Finally, according to Petitioner, Jamison directed him to drive back to the convenience store where Jamison exited taking the clothes and other items. (Id.)

The prosecution called Jamison in its case-in-chief. Jamison denied any involvement in the Lee murder, denied any contact with Petitioner during the latter part of January and early part of February 1976, denied being in Phoenix during the week before Christmas 1975 and January

5 or 6, 1976, and specifically denied the allegations contained in Petitioner's "confession." (R.T., 6/8/77 at 101-05.)

Petitioner presented several defenses to the Lee murder: 1) the State did not meet its burden of proof, 2) Petitioner's "confession" was incredible, 3) there existed other possible perpetrators, and 4) the State conspired to frame Petitioner with the "desert slayings" in order to solve these murders during an election year. Petitioner used Jamison's testimony in support of several of these defenses. On cross examination Petitioner elicited testimony that a man known as "Squirrel" came to Jamison's home and had with him a machete with what appeared to be blood on it and a briefcase with four or five Polaroid photographs of dead young girls whom "Squirrel" bragged about killing. (R.T., 6/8/77 at 107-08.) Jamison testified that "Squirrel" was not Petitioner. (Id. at 109.) In closing arguments, Petitioner argued that "Squirrel" may have murdered Lee. (R.T., 6/16/77 at 76-77.) Jamison's testimony also supports Petitioner's contention that his "confession" was incredible. (Id. at 62-63, 73).

To prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). The performance inquiry is whether counsel's assistance was reasonable considering all the circumstances and should be conducted without the "distorting effects of hindsight." Id. at 688-89. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" Id. Regarding prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. A petitioner's failure to sustain his burden with respect to either part results in a failure of the whole. Id. at 687.

In the present case, the Court need not decide whether Petitioner's trial counsel made a sufficient effort to discover Jamison's prior convictions, because Petitioner was not prejudiced by the alleged deficient investigation. See e.g. Woratzeck v. Stewart, 97 F.3d 329, 336 (9th Cir. 1996). Given Petitioner's theories of the defense, Petitioner's counsel tactically would not have wished to impeach Jamison's credibility, even if counsel had been aware of the prior convictions. Furthermore, given the strong evidence against Petitioner[8] and the inherent unbelievability of Petitioner's story that he was raped and forced to participate by Jamison, there is not a reasonable probability that, had Petitioner impeached Jamison with the prior convictions, the outcome would have been different. Petitioner is denied habeas relief on claim 1-G.

Claim 13: Prosecution Failed to Disclose Witness' Prior Convictions.

In claim 13 Petitioner argues that the Prosecution failed to disclose Jamison's prior felony convictions in violation of Brady v. Maryland, 373 U.S. 83, 87 (1963) Brady requires the prosecution to disclose evidence favorable to the defendant if the evidence is material to either guilt or punishment, irrespective of the good or bad faith of the prosecutors. Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Harris v. Vasquez, 949 F.2d 1497, 1528 (9th Cir. 1990), cert.

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8. The strong evidence of Petitioner's guilt includes testimony that the victim's watch was found in Petitioner's possession at the time of his arrest, the tire tracks in the desert were consistent with Petitioner's vehicle, the knives found in Petitioner's room and car were consistent with the victim's wounds, and the tape and rope found in Petitioner's vehicle were consistent with the marks found on the victim. This physical evidence when combined with Petitioner's "confession" wherein Petitioner admitted that he had driven his car to the scene of the murder and his knives, rope and tape were used during the murder is very strong evidence that Petitioner killed Lee.

denied, 503 U.S. 910 (1992) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).

Petitioner has not proven that the prosecution suppressed Jamison's prior felony convictions. The prosecution gave Jamison's F.B.I. rap sheet to Petitioner's first trial counsel. (R.T., 7/18/77 at 5, 7.) The rap sheet showed that Jamison had been charged with several felonies in Ohio, but the rap sheet did not show their disposition. (See ROA at 169d.) Petitioner's subsequent trial counsel apparently did not receive the rap sheet from first counsel prior to the conviction. (R.T., 7/15/77 at 23.) However, whether Petitioner's counsel had received all documents and discovery from the State was the subject of numerous motions and a pre-trial hearing. (ROA at 34, 81b, 87; R.T., 2/25/77 at 5, 21, 31.) The State opened its entire file, and the trial court ordered Petitioner's counsel to review the files to ensure the defense had everything. (Min. E. of 2/25/77 at 21.) Petitioner's counsel admitted they had complete access to the State's files (R.T., 4/12/77 at 90), but they did not review them. (R.T., 7/15/77 at 23.) No Brady violation has occurred because the defense was not prevented from obtaining the F.B.I. rap sheet and investigating the disposition of Jamison's felony arrests in Ohio. See U.S. v. Winslow, 962 F.2d 845, 849 (9th Cir. 1992).

In analyzing Petitioner's ineffective assistance of counsel claim in claim 1-G, the Court found no Strickland prejudice, i.e. no reasonable probability that the outcome of the trial would have been different had Petitioner known of Jamison's prior felony convictions. Therefore, Petitioner's Brady claim must also fail for lack of materiality. (See prejudice analysis supra at 14-15.)

Claim 14: Malice Instruction Improperly Eliminated the State's Burden to Prove Every Element of the Offense Beyond a Reasonable Doubt.

Petitioner asserts in claim 14 that the trial court's instruction regarding malice created a mandatory presumption in violation of his due process rights. The portion of the instruction at issue is as follows: "If you determine that a defendant has no considerable provocation for killing, you must find malice." (R.T., 6/16/77 at 100.) Petitioner raised this claim in his second post-conviction relief petition. (Ex. N at 1.) At an evidentiary hearing the court reporter testified that the stenographic symbols for "must" is P-H (for M) plus U-S and for "may" is P-H (for M) and A-E-U (for a long A). (R.T., 10/18/85 at 20.) The symbol P-H-A-E-U appeared in her stenographic notes, so the transcript should have read "[i]f you determine that a defendant has no considerable provocation for killing, you may find malice." (Id. at 21, 23.) After considering this testimony and the original written jury instructions, the court made the following findings of fact:

> There is, in my view, no question that the Judge correctly instructed the jury using the word "may" and the sentence in question would be as I just read it, quoting from the written jury instruction on page 153H in Volume II of the record and is consistent with the reporter's notes as to what words were actually spoken to the jury and I find, therefore, that the official transcript insofar as it contains the word "must" on page 100 is inaccurate and does not accurately report what was actually said by the Judge to the jury.

(Id. at 43-45.)

The trial court's findings of fact are presumed to be correct. 28 U.S.C. § 2254(d). The malice instruction given to the jury did not create a mandatory presumption in violation of Petitioner's due process rights. Petitioner is denied habeas relief on this claim.

Claim 17: Trial Court Failed to Obtain a Proper Factual Basis for Petitioner's Guilty Plea.

In claim 17 Petitioner contends his guilty plea for the Spencer murder violates the Due Process Clause because the factual basis is insufficient to establish malice. Due process requires that a guilty plea be knowingly and voluntarily given: a defendant must understand the charges against him and the consequences of a guilty plea and voluntarily waive his rights to a jury trial, to confront his accusers and not to incriminate himself. Henderson v. Morgan, 426 U.S. 637, 645 (1976); Boykin v. Alabama, 395 U.S. 238, 242-43 (1969). However, there is no constitutional requirement that a state court obtain a factual basis before accepting a guilty plea, absent special circumstances. Rodriguez v. Ricketts, 777 F.2d 527, 528 (9th Cir. 1985). See also Meyers v. Gillis, 93 F.3d 1147, 1151-52 (3rd Cir. 1996), and cases cited therein from the Second, Third, Fifth, Sixth, Seventh and Eleventh Circuits that hold there exists no constitutional requirement similar to Rule 11 of the Federal Rules of Civil Procedure. The only special circumstance the courts have identified is when the defendant proclaims his innocence while at the same time he pleads guilty. Rodriguez, 777 F.2d at 528; Stano v. Dugger, 921 F.2d 1125, 1140-41 (11th Cir.), cert. denied, 502 U.S. 835 (1991); Wallace v. Turner, 695 F.2d 545, 548 (11th Cir. 1983); Willett v. State of Ga. , 608 F. 2d 538, 540 (2nd Cir. 1979). In these cases the purpose of establishing a factual basis for the record is not to establish guilt to support the judgment, but rather to aid the court in determining whether the defendant's guilty plea is knowingly and voluntarily given. See North Carolina v. Alford, 400 U.S. 25, 37-38, n.10 (1970).

In the instant case, Petitioner did not maintain his innocence during the change of plea hearing. Petitioner, nevertheless, contends that a special circumstance exists in that Petitioner's counsel repeatedly advised him against pleading guilty because counsel did not believe a factual basis existed. (File doc. 29 at 49.) In fact Petitioner's counsel more than once requested to withdraw because they had privileged information to support their belief that the court could not obtain an adequate factual basis. (See R.T., 7/7/77 at 7-8, 18, 22.)

The fact that Petitioner's attorney counseled him against pleading guilty because they believed no factual basis could be obtained does not constitute a special circumstance akin to a defendant maintaining his innocence. Petitioner specifically testified that he had not informed his counsel of the facts supporting his guilt. (Id. at 19.) As the trial court noted, many defendants do not disclose such facts to their counsel. (Id. at 21.)[9] In this instance the Constitution does not require the trial court to obtain a factual basis. Rodriguez, 777 F.2d at 528. Whether the factual basis is sufficient pursuant to state law is not justiciable on habeas corpus review. Estelle v. McGuire, 502 U.S. 62, 67 (1991). Additionally, the Court finds that Petitioner's guilty plea was knowingly and voluntarily given. The court informed Petitioner of the elements of first-degree murder that the State would have to prove (R.T., 7/7/77 at 22-23), the possible sentences that could be imposed as a result of the guilty plea, including the possible aggravating circumstances to support the death penalty (Id. at 8-13), and every right Petitioner would waive by pleading guilty[10] (Id. at 13-16). Petitioner, who was 28 and had two years of college education, testified that he understood all that the court explained. (Id. at 8.) Petitioner also testified that no promises or threats were made to induce him to waive his rights and plead guilty. (Id. at 16-17.)

As an alternate ruling the Court finds that Petitioner's factual basis is sufficient to establish malice. The Arizona Supreme Court addressed this issue on direct appeal and found Petitioner's testimony that he intended to cause the death of the victim expressly established malice. State v. Smith, 123 Ariz. 231, 235, 599 P.2d 187, 191 (1979). This Court agrees. The following testimony satisfies the Court that Petitioner intended to kill Spencer and did so without provocation:

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9. The trial court also stated it would consider counsel's statements concerning the factual basis and Petitioner's motive for pleading guilty when determining whether the guilty plea is a willing, intelligent and voluntary plea. (R.T., 7/7/77 at 21.)

10. A jury trial had begun in this case, so Petitioner was well aware of the rights he waived by pleading guilty.

Q. How did you kill her?

A. Strangled her.

Q. How?

A. By using dirt.

(R.T., 7/7/77 at 27.)

Q. Okay. What did you do? We have injuries such as these and I will read them from Exhibit 30 in evidence. She suffocated due to gagging. There was moist sandy dirt in her nose and mouth, multiple superficial stab wounds of the groin and pelvis. There was a laceration of the posterior hymenal ring. There were abrasions of the ankles and wrists compatible with previous binding.

There were small stab wounds of the left and right breasts. There was a two and a quarter inch length ordinary sewing needle imbedded in the subcutaneous tissues of the left breasts [sic] and chest wall.

Did you do those things?

A. Yes.

Q. Tell me how you did them.

A. She got me mad about something and I tied her up first. Then after that, that's when I killed her. Then I took the bindings off. I decided to take all of her clothing and everything and get rid of it.

(Id. at 29-30.)

Q. When you forced dirt into Sandy Spencer's mouth and up her nose, did you do it with the intention of killing her?

A. Yes.

Q. Had you thought about killing her before you stopped by the side of the road to talk?

A. No.

Q. When was the first time you thought about killing her?

A. I did not even think about it. It just happened.

Q. Well, you indicated she said something to make you mad.

A. Uh-huh.

Q. Was that the first time you thought about killing her?

A. Yes.

(Id. at 41.)

Q. . . . When you were forcing the dirt into her mouth and up her nose were you doing this with the intention and as a result of wanting to kill her?

A. No.

MR. GERBER: Your Honor, I believe he answered that question previously in the affirmative. He did intend to kill her in the previous answer.

MR. SMITH: You are asking when I was riding around did I -- did I try to pick up somebody with that idea in my mind. No.

Q. BY THE COURT: I am stating, at the time you were doing it, were you doing it because you wanted to kill her?

A. Yes.

(Id. at 44-45.) Petitioner is denied habeas relief based on this claim.

Claim 18: Petitioner Received Ineffective Assistance of Counsel at Resentencing.

Petitioner contends in this claim that counsel for resentencing rendered ineffective assistance for failing to investigate and present the following mitigation evidence: testimony from Larry Maddox, a pastor who visited Petitioner while he was incarcerated on a prior rape charge, and Richard Todd, the defense investigator, that Petitioner had multiple personalities; testimony from Debbie Lippiett, Petitioner's former girlfriend, that Petitioner was subject to wide mood swings; and testimony that Petitioner was well-behaved and subject to the violent attacks of other prisoners while incarcerated.

In most instances to prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). Prejudice may be presumed, however, if a petitioner's counsel fails to provide adversarial testing of the prosecution's case. United States v. Cronic, 466 U.S. 648, 659 (1984). The Supreme Court identified the following as situations in which prejudice would be presumed: when a defendant has no counsel, was denied the right of effective cross-examination, or was subject to circumstances wherein no lawyer, even a competent one, could provide effective assistance. Id. at 659-61.

Petitioner contends counsel acted as a neutral observer at the resentencing when he presented no new mitigation evidence even though the trial court had imposed the death penalty based on the same evidence at the first sentencing. Thus, Petitioner argues the Court

should presume prejudice. The Court disagrees. At the resentencing Petitioner's counsel did challenge the imposition of the death penalty by submitting the transcript of Dr. Goldberg's testimony from the first sentencing and the deposition of Dr. Hoogerbeets as mitigation evidence. (R.T., 10/26/79 at 6.) Counsel also filed a Motion to Declare Death Penalty Unconstitutional in which he argued that the statute under which Petitioner was sentenced was found to be unconstitutional, therefore, Petitioner's death sentence should be reduced to life imprisonment. Counsel also presented numerous arguments concerning why Petitioner should not be resentenced under State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979). (ROA at 273.) Additionally, counsel moved for another mental health examination based on the Probation Officer's suggestion in the supplemental presentence report. (R.T., 11/7/79 at 7-8.) Finally, counsel successfully challenged the court's consideration of Dr. Cleary's testimony. (Id. at 4-6.) Counsel's actions do not arise to the extreme situations described in Cronic such that prejudice may be presumed.

Failing to investigate and present the testimony of either Larry Maddox or Richard Todd regarding their lay opinions that Petitioner had multiple personalities is not deficient performance. Petitioner was examined by three mental health professionals, two doing so on behalf of the defense. No expert identified any clinical symptoms of multiple personalities and none diagnosed Petitioner as having any major psychosis. Petitioner also cannot prove prejudice. It is extremely unlikely that had such testimony been presented, the judge would have lent credence to these lay opinions over the expert opinions of the mental health professionals. For the same reasons, Petitioner cannot prove he was prejudiced by counsel's failure to present the testimony of Debbie Lippiett that Petitioner was subject to wide mood swings.

Lastly, Petitioner was not prejudiced by counsel's failure to present testimony that Petitioner was well-behaved and subject to violent attacks while incarcerated. This information is in the supplemental presentence investigation report which the judge read and considered for mitigation purposes. (ROA at 81a, 276.) See Woratzeck v. Stewart, 97 F.3d 329, 336 (9th Cir. 1996) (no prejudice for failing to

contact and present witnesses because the presentence report contained the information and was considered by the sentencing judge). For these reasons, claim 18 is without merit.

Claim 20: Trial Court Failed to Consider Mitigating Evidence.

In claim 20 Petitioner contends that the trial court failed to consider the mitigating evidence to establish nonstatutory mitigating circumstances. Petitioner focuses his argument on the testimony of Drs. Hoogerbeets and Goldberg, which Petitioner contends establishes that he suffered from a mental disease or defect that impaired his judgment.

The United States Supreme Court has consistently held that a sentencer must consider any relevant evidence offered by a capital defendant in support of a sentence less than death. Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978); see also Boyde v. California, 494 U.S. 370, 377-78 (1990). The sentencer is not, however, required to find the proffered evidence mitigating, nor must the sentencer accord the evidence the weight a defendant believes is appropriate. Eddings, 455 U.S. at 114-15, 117.

Due process does not require that the sentencer specifically list and discuss each piece of mitigation evidence. Jeffers v. Lewis, 38 F.3d 411, 418 (9th Cir. 1994), cert. denied, 115 S. Ct. 1709 (1995). As long as the federal habeas court can ascertain from a review of the record that the state court did indeed consider all mitigation evidence offered by the defendant, due process has been satisfied. Jeffries v. Blodgett, 5 F.3d 1180, 1197 (9th Cir. 1993) (citing Parker v. Dugger, 498 U.S. 308, 314-19 (1991) and Clark v. Ricketts, 942 F. 2d 567, 574 n.5 (9th Cir. 1991), amended on other grounds, 958 F.2d 851 (1992)).

The record is clear that the sentencing court considered all evidence in mitigation proffered by Petitioner. The court stated as follows:

> As to mitigating circumstances pursuant to the Watson case, I have indicated that I would consider any mitigating circumstances. As a guide to determine what mitigating

circumstances there were and are, I have used A.R.S. Section 703G . . .. That section is used for guidance and not in limitation in any way of the mitigating circumstances which could be shown.

(R.T., 11/7/79 at 12.) See Woratzeck, 97 F.3d at 334 (it is clear the court considered all nonstatutory mitigating circumstances because the court cited Watson which held such circumstances must be considered); see also Parker, 498 U.S. at 314 (it is assumed trial judge considered all evidence because he said he did); Clark, 942 F.2d at 575 (statements of sentencing court that it considered all mitigating evidence satisfy demands of due process). Furthermore, specifically regarding the testimony of Drs. Hoogerbeets and Goldberg, the Arizona Supreme Court stated, "Nor do we find that the psychiatric testimony offered by appellant constitutes a mitigating factor other than those set forth in A.R.S. § 13-454(F)." State v. Smith, 131 Ariz. 29, 35, 638 P.2d 696, 702 (1982). The fact that the state courts did not find the proffered evidence mitigating or sufficiently substantial to call for leniency does not violate the Constitution. Eddings, 455 U.S. at 114-15, 117.

Claim 27: Trial Court Considered Evidence Obtained in Violation of Petitioner's Fifth and Sixth Amendment Rights.

Relying on Estelle v. Smith, 451 U. S. 454 (1981), Petitioner contends the admission of Dr. Cleary's rebuttal testimony during the aggravation/mitigation hearing violated his Fifth Amendment privilege against self-incrimination because Dr. Cleary failed to administer Miranda warnings to Petitioner prior to the examination. Petitioner also contends that his Sixth Amendment rights were violated because counsel were not aware of the possible uses of Dr. Cleary's examinations such that they could properly advise Petitioner.

The Supreme Court in Estelle v. Smith determined that Smith's Fifth Amendment privilege against self-incrimination was violated when statements made by Smith during a competency examination were used to establish future dangerousness during the sentencing

phase. 451 U.S. at 468. The psychiatrist had not informed Smith of his right to remain silent prior to the examination or that his statements may be used against him at sentencing. Important to the Court's ruling was that the trial court had sua sponte ordered the psychiatric examination to determine Smith's competency without notifying defense counsel and the defense had not offered any psychiatric testimony at trial. Id. at 466. As the Court noted: "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." Id. at 468. However, if a defendant requests a psychiatric examination and presents a mental-impairment defense either to the offense or the death penalty, the defendant waives a Fifth Amendment challenge to the prosecution's rebuttal use of information received during the psychological evaluation. Buchanan v. Kentucky, 483 U.S. 402, 422-23 (1987) (counsel joined the prosecution in request for mental examination and presented mental-status defense).

In the present case Petitioner requested a pre-trial psychological examination to determine both his competency to assist counsel in his defense and his mental state at the time of the offense. (ROA at 46a.) The Court granted Petitioner's request and appointed Drs. Hoogerbeets, Cleary and Garcia-Bunuel. (Min. E. of 2/25/77.) The appointment instructed the doctors to examine Petitioner to determine his competency to stand trial and his "probable mental condition . . . at the time he committed the offense." (ROA at 52.) Furthermore, after Petitioner was convicted of the first-degree murder of Lee, he requested the appointment of Dr. Goldberg "to determine if the defendant has any mental defect that would give rise to mitigating facts" (ROA at 176), which the court granted. (Min. E. of 7/29/77 at 16.) At the aggravation/mitigation hearing, Petitioner presented the testimony of Dr. Goldberg and deposition of Dr. Hoogerbeets in mitigation of the death penalty. (Min. E. of 8/29/77 at 7, 9.) To rebut this mitigation evidence, the State offered the testimony of Dr. Cleary. (Id. at 11.) Petitioner, having requested the appointment of psychiatric experts and having presented a mental-impairment defense to the death penalty, has waived his Fifth Amendment privilege against self-incrimination

regarding information given to Dr. Cleary during the mental examination. Buchanan, 483 U.S. at 422-23.

Although a defendant may waive his Fifth Amendment privilege if he presents a mental-impairment defense, the defendant may still be able to advance a Sixth Amendment claim if the scope of the examination is broader than that which counsel had notice. Powell v. Texas, 492 U.S. 680, 684-85 (1989); Buchanan, 483 U.S. at 424-25. Petitioner argues that "the defense request for the mental health examination was primarily for the purpose of determining competency to stand trial. Thus, because counsel was not aware of the possible use of Dr. Cleary's examination, the use of Dr. Cleary's testimony violated Mr. Smith's constitutional rights." (File doc. 29 at 86.) Petitioner's argument is without merit. In addition to a determination of whether Petitioner was competent to stand trial, Petitioner's counsel requested that the mental health experts examine Petitioner to determine his mental status at the time of the offense. Therefore, counsel had notice that the examination was not limited in scope to a determination of Petitioner's competency to stand trial. Once counsel offered as mitigating evidence Petitioner's mental status, they had to anticipate the State would present psychological evidence in rebuttal. The court finds no Sixth Amendment violation. Buchanan, 483 U.S. at 425.

Motion for Substitution of Counsel.

Counsel for Respondents, Linda A. Akers, has moved for permission to withdraw effective October 31, 1996, because she has been appointed to fill a vacancy on the Maricopa County Superior Court. A representative of the Attorney General's office has consented to having William P. French of Morrison & Heckler substituted as counsel for Respondents. For the reasons stated therein, Respondents' motion for substitution of counsel is granted.

Accordingly,

IT IS HEREBY ORDERED granting Respondents' Motion for Summary Judgment **[file doc. 65].**

IT IS FURTHER ORDERED denying with prejudice Petitioner's Petition for Writ of Habeas Corpus and all amendments thereto **[file doc. 1, 25].**

IT IS FURTHER ORDERED denying with prejudice Petitioner' s Motion to Reconsider Issues of Preclusion, Right to Counsel, and Vagueness [file doc. 104].

IT IS FURTHER ORDERED granting the Motion for Permission to Withdraw and for Substitution of Counsel for Respondents **[file doc. 112].** William P. French, Esq. of Morrison & Heckler, 2800 North Central, Suite 1600, Phoenix, Arizona 85004-1047, (602) 279-1600, is substituted as counsel for Respondents nunc pro tunc as of October 31, 1996.

IT IS FURTHER ORDERED vacating the stay of execution entered by the Court on October 3, 1991 **[file doc. 4].**

IT IS FURTHER ORDERED that the Clerk of the Court mail a copy of this order to all counsel of record.

DATED this 21st day of January, 1997.

S/_____
Paul G. Rosenblatt
United States District Judge

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DISTRICT OF ARIZONA
BY_____DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

JOE CLARENCE SMITH, JR.,	)	No. CIV-91-1577-PHX-PGR
	)	
Petitioner,	)	
	)	
vs.	)	**ORDER**
	)	
SAMUEL LEWIS, et al.,	)	
	)	
Respondents,	)	

IT IS HEREBY ORDERED that the Clerk of the Court make a certified copy of Exhibits A through T that accompanied Respondents' motion to dismiss Petitioner's second habeas corpus petition, CIV 87-497-PHX-PGR. It is further ordered that the Clerk incorporate said certified copy of the exhibits into the file in this action.

IT IS FURTHER ORDERED that the Clerk of the Court send copies of this Order to all counsel of record.

DATED this 21st day of January, 1997.

S/_____
Paul G. Rosenblatt
United States District Judge